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Faithful agent or independent actor? The European Commission in the external dimension of EU Energy Policy

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Abstract

Energy policy in the European Union (EU) is a patchwork of diverging interests and preferences. While the European Commission pushes for a common energy policy, Member States are responsible for their own separate energy policies. These divergences in interests and preferences might create a conflict situation between the Commission and Member States. This thesis explores the Commission's behaviour vis-à-vis the Member States, investigating the conditions under which the Commission is likely to try to deviate from Member States' preferences in the external dimension of the EU internal energy market.

Adopting a Principal-Agent Model (PAM), this thesis conceptualizes the Member States as principals and the Commission as their agent. A qualitative case study approach and process-tracing method are applied to appreciate the variety of preferences of the actors involved, and provide a means to study the various shades of post-delegation agent's behaviour. This thesis looks at four in-depth case studies: 1) Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy; 2) Directive 2009/73/EC on common rules for the internal market in gas; 3) Energy Community Treaty; and 4) Energy Charter Treaty. These were selected based on their relevance to the research question.

Findings suggest that two factors are likely to affect the Commission's deviation from Member States' preferences: a) the *preference* alignment among the principals and b) the *preference* alignment between the principals and the agent. This thesis suggests that when the *preferences* between the agent and the principals are heterogeneous, the agent is more likely to deviate from the *preferences* of the principals. This thesis also suggests that the *preference* alignment among the principals only has a secondary effect on the agent's deviation. Finally, this research contributes to the further development of the PAM offering a possible categorisation of post-delegation agent's behaviour going beyond the dichotomy of deviation and non-deviation.

Declaration

I hereby declare that, except where otherwise indicated, this thesis is entirely my own work, and that no part of it has been submitted for any other degree or qualification.

Francesca Batzella

List of Abbreviations and Acronyms

CFSP	Common Foreign and Security Policy
CSCE	Conference on Security and Cooperation in Europe
COREPER	Committee of the Permanent Representatives of the Governments of the Member States to the European Union
CP(s)	Contracting Parties
DSO(s)	Distribution System Operator(s)
EC	European Community
ECRB	Energy Community Regulatory Board
ECT	Energy Charter Treaty
EEC	Eastern European countries
SEE	South East Europe
EEU	Effective and Efficient Unbundling
EnCT	Energy Community Treaty
EnCT	Energy Community Treaty
EU	European Union
IEA	International Energy Agency
IGA(s)	Intergovernmental Agreement(s)
ISO	Independent System Operator
ITO	Independent Transmission Operator

ITRE	European Parliament Committee on Industry, Research and Energy
LNG	Liquid Natural Gas
NGL	Natural Gas Liquids
OW	Ownership Unbundling
PHLG	Permanent High Level Group
TAP	Trans-Adriatic Pipeline
TFEU	Treaty on the Functioning of the European Union
TSO(s)	Transmission System Operator(s)
VIU	Vertically Integrated Undertaking

Chapter 1 Introduction
The Energy Policy of the EU and its External Dimension

1.1. Introduction

Energy policy is one the most sensitive policies at both European and national level. Given its economic importance, energy policy has – and probably will always have – a high political sensitivity. If we consider that the EU is heavily dependent on energy supplied by non-EU countries, it does not come as a surprise that energy policy has a strong and particularly relevant external dimension. Some EU Member States have very high dependency rates from one single country. It must also be considered that the internal and external dimensions of EU energy policy are strongly interrelated. An internal energy market has been one of the main objectives of the EU since the 1990s when the first directives prescribing the liberalisation of the energy markets entered into force. An internal energy market however, cannot exist without a coherent external dimension. For this reason, this thesis looks at the *external dimension of the EU internal energy market*.

The topic of the *external dimension of the EU internal energy market* is particularly important because it impacts the economies of individual Member States and of the EU as a whole. Energy policy is becoming increasingly important because of the political instability of the countries from which energy is imported (e.g. Northern Africa and the Middle East, Russia, Ukraine). In addition, world demand for energy is increasing with countries like China and Japan becoming great EU competitors.

This thesis suggests that energy policy cannot be considered exclusively from the point of view of the Member States any longer. Rather, it seems that energy policy has gained an important European dimension and that the European Commission is now an important actor in this policy area. An academic explanation the role of the European Commission in the *external dimension of the EU internal energy market* is warranted. How does the Commission behave when it comes to the external dimension of the EU energy policy? Does the Commission behave as an entrepreneur pushing for more liberalisation? Does the Commission constrain the Member States in their national energy policies, or is the Commission constrained by Member States? To address these questions, this research focuses on the relation between the Commission and the Member States as a key explanatory factor of the external dimension of EU energy policy.

This chapter is structured as follows. The next section offer facts and definitions about energy policy (1.2.). Section 1.3. moves to the review of the literature and stresses the gap which this thesis aims to address. The chapter then turns to the research question (1.4.) and the theoretical framework (1.5.) of this study. The research design is explained in section 1.6. The chapter concludes with an outline of the thesis (1.7.).

1.2. Energy Policy in the European Union: facts and definitions

Two of the treaties establishing the European communities dealt with energy: the Treaty of Paris, establishing the European Coal and Steel Community in 1951 and the Treaty of Rome, establishing the European Atomic Energy Community in 1957. The Treaty establishing the European Economic Community in 1957 however "contains no word" on energy policy (Cross et al 2007, 227). The lack of a specific chapter on energy in this Treaty has hindered the development of Community energy law and policy (Ibid). According to Pielow and Lewendel (2012, 265) this "self-effacement of the Treaty has to be explained by the Member States' determination to sustain their independence in the sense of an own and *national* energy (supply) policy and to consider this area as part of their sovereignty". As a result, the structures of energy industry and the choices of energy mixes differ greatly across Member States.

The Single European Act (SEA), signed in 1987, established the objective of an "internal market" by the end of 1992, together with a legal basis for the adoption of related legislation with qualified majority voting instead of unanimity. The European Commission then used these provisions for broad legislative initiatives in the electricity and gas sectors, together with a more vigorous enforcement of the Treaty rules on competition and free movement. The Treaty on European Union, signed in 1992, listed measures in the "spheres of energy, civil protection and tourism" among the Community activities and also added an Article on the promotion of trans-European networks (TENs) in the areas of transport, telecommunications and energy infrastructure (Pielow and Lewendel 2012).

Since the 1990s, the body of Community energy and environmental legislation has been extended significantly (Ibid). According to Cross et al (2007, 230), "although various deficiencies in the legal framework for energy have become more apparent of late, the overall experience demonstrates that the Community's policy-making engines and law-making institutions have found the necessary means and modalities to elaborate and update a fairly thorough legislative framework relating to the energy sector without having to rely upon the formality of an "energy chapter" in the Treaty". Regardless of the absence of a specific legal basis, the European Community developed a "step-by-step policy" (Pielow and Lewendel 2012, 266) making use of the general competence of the EC treaty applying to all economic sectors.

As far as the external dimension of energy policy is concerned, this has been "constructed through a conjunction of interests between the Member States" (Belyi 2007, 198). A first coordination among Member States emerged after the first oil crisis in 1973; however, it did not result in a specific common policy. Despite the lack of a clear legal basis for energy in the Treaties, the EU has negotiated international agreements with third countries in the field of energy. Relying on the former Articles 133, 300 EC Treaty (now Articles 207, 218 TFEU), the European Community took action under the framework of the WTO, and signed bilateral agreements such as the energy partnership negotiations and commitments with Russia (Pielow and Lewendel 2012, 273). In this context, a framework was also developed, providing mechanisms for the integration of regional energy markets in neighbouring countries into the EU

internal energy market under a "common regulatory space" (Cross et al. 2007, 231). Examples include the Energy Charter Treaty and the Energy Community Treaty. In 1991 Member States and the European Community signed the Energy Charter concerning the production and transportation of gas from the Commonwealth of Independent States (CIS). Similarly, in 2005, the EU signed the Energy Community Treaty aiming to extend the internal energy market to include South Eastern Europe and the Black Sea region. In addition, the EU has developed both bilateral cooperation agreements with third countries as well as with international organizations such as the International Energy Agency (IEA), the Organization of Petroleum Exporting Countries (OPEC), and the International Atomic Energy Agency (IAEA).

In short, despite the limits of the Treaty framework, the EC/EU has managed to create what Pielow and Lewendel (2012, 273) call a "de facto foreign energy policy of the EU"; this means that the EC/EU has not only been able to take part in international organizations dealing with energy but also to sign bilateral and multilateral agreements with non-EU countries in the field of energy.

A legal basis for energy was only introduced with the Lisbon Treaty. Article 4 para 2 lit. i) of the *Treaty on the Functioning of the European Union* (TFEU)[1] establishes a shared competence between the Union and Member States in the energy sector. This means that, in principle, both the EU and the Member States may adopt legally binding acts in energy. Article 194 TFEU establishes that Union policy on energy shall aim to (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks. The article also states that these aims shall be achieved "in a spirit of solidarity between Members" and "in the context of the establishment and functioning of the internal market and with regard for the need to preserve and improve the environment."

[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007 (2007/C 306/01). Available from http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML.

On the other hand, the second paragraph of Article 194 TFEU states that the measures necessary to achieve the objectives in paragraph 1 shall be established by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. More importantly, the paragraph states that such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply.

Article 194 TFEU has been called a "typical political compromise" that created "a real and additional strengthening of competences in favour of the EU" but also allows Member States to deviate from the Union's energy policy (Pielow and Lewendel 2012, 267–8).

To summarise so far, EU energy policy was initially developed as a set of provisions for broad legislative initiatives in the electricity and gas sectors in the framework of the completion of the internal market in early 1990s. Given the reluctance of Member States to give up sovereignty and control over this area, a clear legal basis for energy in the Treaties was established only when the Lisbon Treaty entered into force in December 2009. Despite the lack of a legal basis, an external dimension of the EU energy policy also developed as the EC/EU signed international agreements in the field of energy.

The next section turns to the current academic debate on energy policy, identifying the gaps and illustrating how this thesis aims to contribute to the development of knowledge in this field.

1.3. Literature on EU Energy Policy

The literature on EU Energy policy is rather broad and diverse. One of the most relevant themes concerns EU-Russia energy relations, looking at EU-Russia energy dialogue (Aalto 2008; Hadfield 2008), the impact of rational cost–benefit orientations in individual Member States on collective bargaining outcomes in EU–Russia energy negotiations (Bozhilova and Hashimoto, 2010), and the role of Russia in energy relations with the EU (Larsson 2006; Romanova 2013; Romanova 2014). Other

scholars have focused on energy security, looking at securitisation (Khrushcheva 2011), regional and inter-regional energy co-operation (Kirchner and Berk 2010), discourse on energy security (Kurze 2010), EU's soft power in the energy sector (Goldthau and Sitter 2015), Member States' decisions on domestic supply security (Schmidt-Felzmann 2011), and perceptions of energy security of internationally operating energy firms and EU institutions (Stoddard 2012). For this research however, four main themes are of particular importance: a) difficulties in building a common energy policy, b) the external dimension, c) the role of the Commission, and d) the role of Member States.

a) Difficulties in building a Common Energy Policy (CEP)

The most complete piece of academic work on EU energy policy is Matlary (1997) in which the author analyses the development of energy policy in the EU, and focuses in particular on the key period between 1985 and 1995 and the role of the major states and their interaction with the Commission. Matlary claims that energy policy is one of the fields in which there have been the biggest and most persistent conflicts of interest between the Commission, Member State governments, and other interest groups. The role of Member State governments in this policy area has traditionally been dominant, and in many ways, still is. The emergence of the EU as a major actor in European energy policy since 1985 however, has brought about an increase in the importance of energy policy on the EU agenda.

The problem of a CEP is often analysed in relation to liberalisation, law and the regulation of energy markets (McGowan 2008; Cameron 2002; Buchan 2010a). Because of the national interests in this field, liberalisation has become an important principle of EU's internal energy policy and of its energy diplomacy. There appears however to be a mismatch between, on the one hand, an ostensible commitment to internal and external liberal strategies led by EU authorities and, on the other hand, conduct inside and outside the Union where governments support and protect incumbent firms (McGowan 2008). It appears difficult for the EU to conduct common energy diplomacy when many Member States not only maintain policies at odds with the overall orientation of market liberalisation but also seem to prefer to work with national companies to arrange future energy supplies with external suppliers.

b) The external dimension

Broadly speaking, there is general agreement among scholars that the internal and external dimensions of energy policy are mutually dependent. Differences over internal market liberalisation, for example, have undermined external energy strategy (Youngs 2007). Scholars point out that the external dimension is seriously hampered by Member States' efforts to defend their sovereignty (Baumann and Simmerl 2011; Belyi 2008; Haghighi 2007; Youngs 2007; Axelrod 1996) . Most of this literature has focused on the relations between the EU and third countries. More specifically, some authors have looked at the EU's attempt to seek to expand its energy market and its principles and regulations in the near-abroad (Lavenex 2004; Prange-Gstöhl 2009; Padgett 2011; McGowan 2008). Other scholars have also provided useful overviews of the EU's external relations with major supplying countries (Haghighi 2007; Youngs 2009). More recently, Herranz-Surrallés (2014) has offered a comprehensive review of the literature on the European external energy policy identifying three specific dimensions: a) the external dimension of the internal energy market; b) energy security or foreign energy policy and c) the intersection between energy policy and other foreign policy aims. In doing so, this categorization stresses the links between the internal and external dimensions of EU energy policy. As will be illustrated in more detail in section 1.4, this literature is used to define the research question of this thesis.

c) The role of the Commission

The role of the European Commission in both the internal and external dimension of energy policy has also been considered. Scholars have highlighted the Commission's pressure on Member States to implement the liberalisation of the internal market in gas and electricity (Eikeland 2011), as well as its policy entrepreneurship and supranationalism (Maltby 2013), and its activism in the evolution of the European Union's external energy policy (Mayer 2008). The Commission's difficulties in dealing with the increasing heterogeneity of needs and preferences among member states have also been discussed (Braun 2009). Finally, Buchan (2011b) offered a very useful overview of the latest Commission's initiatives in expanding the European dimension of energy policy. The picture emerging from the analysis of this literature is particularly interesting for the purpose of this study: the Commission is frequently

depicted as a particularly active actor in the external dimension of the energy policy (McGowan 2008; Mayer 2008). It has been argued that the European Commission is trying to "externalise" internal energy market principles in its neighbour countries and to extend internal energy market rules to third countries' energy companies operating within the EU (Riley, 2012). Other scholars argue, more generally, that the European Commission is "constantly speeding up its output […] in order to push the project of a common energy policy forward (Baumann and Simmerl 2011). To sum up, literature depicts the Commission as playing an active role in both the internal and external dimension of EU energy policy.

d) The role of Member States

Conversely, scholars also stress the persistence of Member States in conducting "their own foreign energy policies" (Buchan 2010a). Andoura, Hancher, and Van Der Woude (2011) for example, argue that Member States perceive energy as a strategic issue and are intent on maintaining national control and preferences over energy resources as a matter of national policy. Nonetheless, scholars also suggest that there are "some signs of willingness, or at least connivance, on the part of Member States to coordinate and even to delegate some of their security of supply functions to the EU" (Youngs 2011). (Buchan 2011b, 40) argues that in some areas of external energy policy "Member States have been content for Commission officials to talk about energy to their hearts' content in all the "dialogues" they hold with countries or groupings around the world, and to try to "export" EU energy policy and rules to neighbouring countries through the Energy Community and the Energy Charter Treaty".

The literature reviewed in the four points above indicates that studies so far have focused either on the role of the Commission or on the role of Member States, arguing that they have divergent interests (Braun 2009) and that the former has been very active in pushing for its role in the field (Mayer 2008). The literature however does not seem to test any concrete hypothesis about the relationship between these actors and the factors likely to affect this relationship. Addressing this gap, this thesis conceptualizes the relationship between the Commission and the Member States in a principal-agent relationship and tests some hypotheses about the factors likely to affect the Commission's behaviour as agent of the Member States. This will contribute to a better

explanation of the inter-institutional relationship in other policies areas as well, enriching this branch of the literature.

To conclude, this section has highlighted the main themes in the literature on EU energy policy: the difficulties in building a common energy policy, the external dimension, the role of the Commission and the role of the Member States. It has highlighted a significant gap about the dynamics of the relationship between these actors. To address this gap, the following section presents the research question and objective of this thesis and outlines the specific contribution to the academic literature in this field.

1.4. Research question and objective

The primary objective of this thesis is to explain the Commission's behaviour in the external dimension of the EU energy policy. In particular, this thesis discusses the Commission's behaviour vis-à-vis the Member States and whether the Commission tends to satisfy the preferences of the Member States or its own preferences in the external dimension of the energy policy. The research question that is being address therefore is:

> *Under what conditions does the European Commission try to deviate from Member States' preferences in the external dimension of the EU internal energy market*?

In other words, this study aims to explain the conditions (the independent variables) that might affect the Commission in deviating from Member States' preferences (the dependent variable). The analysis is conducted in a specific policy area - *the external dimension of the internal energy market* – with the aim of deriving generalizable results about the effect of preferences and interests on the Commission's behaviour. As mentioned earlier in this chapter (1.3.b.), the *external dimension of the EU internal energy market* is defined by Herranz-Surrallés (2014) as one of three main dimensions of the EU external energy policy.[2] It "includes the EU's activity aimed at the creation

[2] The remaining two dimensions are: b) energy security or foreign energy policy and c) the intersection between energy policy and other foreign policy aims (Herranz-Surrallés 2014).

of a common energy regulatory space with third countries" (Ibid). The *external dimension of the EU internal energy market* manifests itself as

- internal EU legislation concerning the Internal Energy Market and its external dimension (i.e. Directives and Decisions); and
- initiatives aiming at the creation of an integrated energy market with third countries (i.e. Energy Community Treaty, Energy Charter Treaty).

This distinction between the internal and external dimensions of EU energy policy will also be revisited in the case selection section of the research design (3.6.1).

To summarise therefore, this thesis seeks to contribute to the explanation of the Commission's behaviour vis-à-vis the Member States, and the dynamics of their inter-institutional relations in the external dimension of the EU internal energy market.

1.5. Theoretical framework

This section turns to the theoretical framework of this study. As will be illustrated in more depth in Chapter 2, the research question and objective of this thesis pose at least three analytical requirements. First, a suitable theoretical framework needs to account for the active role of the Commission in the external dimension of the EU internal energy market. Second, a framework as such needs also to account for the role of the Member States who are willing to keep oversight and control over this policy area. Finally, the dynamics of the relation between the Commission and the Member States also need to be captured.

The Principal-Agent Model (PAM) of delegation seems to meet these three criteria, providing the theoretical tools to analyse the relationship between one or more principals and their agent. The model starts from the assumption that principals delegate some power to an agent in order to reduce transaction costs (Pollack 2003). The model also assumes that the principals and the agent have different preferences, and that the latter will try to behave opportunistically and satisfy its own preferences rather than those of the principals. PAM seems useful in explaining the relations between the Commission and the Member States in the external dimension of the EU

internal energy market. Member States delegated powers such as agenda-setting and external representation to the Commission which are the object of this study. The Member States and the Commission however have different interests and preferences when it comes to energy policy. While Member States aim to keep control and oversight over energy policy, the Commission aims to maximize its competence in the field. As such, the analytical tools provided by the PAM are particularly useful to explain the Commission's behaviour in terms of its relation with the Member States, and thus to address the research question of this thesis.

Another important aspect of the PAM is that it allows taking the role of preferences into account. More precisely, building on Rational Choice Theory, the model assumes that actors have preferences and tend to maximise their utility. For this reason, the PAM is particularly suitable for analysing how preferences drive the Commission and the Member States in the external dimension of energy policy. This point will be covered more extensively in the discussion of the theoretical framework (Chapter 2).

In looking for a theoretical framework, this thesis also reviews some alternative theoretical approaches that could have been used. Firstly, actor-centric theories such as Neofunctionalism and the Rational Choice Institutionalism; secondly, state-centric theories such as Intergovernmentalism and its variant, Liberal Intergovernmentalism, and, finally Multi-Level Governance that sheds light on inter-institutional relations. None of these approaches however, if considered on their own, would be sufficient to address the research question of this thesis. The PAM seems to be the most useful to address the research question of this thesis.

1.6. Research design and methodology

The research design of this thesis aims to explain factors likely to affect the *Commission's deviation from Member States' preferences in the external dimension of the EU internal energy* market. These conditions – independent variables – are the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2). Each variable can take two values: preferences can be homogeneous or heterogeneous. Starting from the different values that each independent variable can take, this research has developed four hypotheses

about the conditions under which the Commission might deviate from Member States' preferences.

As far as the first independent variable (preference alignment among the principals) is concerned, potential challenges arise with respect to the measurement when the preferences among the principals are heterogeneous. In these cases, a benchmark needs to be identified in order to compare these preferences with those of the Commission. As will be explained in more depth in Chapter 3, when this is the case, *a small subset of Member States sharing homogenous preferences* is identified. The small subset is identified through preliminary research which reveals which Member States are the most relevant and active in a particular case study. The use of an empirically informed small subset of active Member States and its value as analytical device will be revisited in the conclusion of this work when looking for a possible wider contribution to the PA literature.

The four hypotheses are tested by applying a qualitative case study method to reflect diversity and to develop more comprehensive insights into the way the Commission and Member States act. Four case studies are selected as intensive studies of a "single unit for the purpose of understanding a larger class of (similar) units" (Gerring 2004, 342). Cases have been selected according to their relevance to the research question (Burnham 2004), and according to three selection rules, notably, a) involvement of the European Commission; b) conditions that may affect the Commission in its ability to deviate from Member States' preferences and c) the external dimension of the EU internal energy market. These criteria are illustrated in more depth in the research design chapter (3.6.1). For the purpose of this introductory chapter it is important to stress that these criteria reflect the relevance to the research question together with variation across the dependent variable and independent variables.

As far as data collection and data analysis are concerned, this research relies on a wide range of both primary and secondary sources to reflect the variety of preferences of the actors involved in this study. Primary sources include direct evidence of decision-making in policy documents and 29 semi-structured interviews conducted by the author mainly with officials within the Commission's Directorate General for Energy

(DG Energy) and within several Member States' Permanent Representations. Other relevant interlocutors working at the European External Action Service, think tanks, business associations and other DGs of the Commission were also interviewed (see Appendix I for a list of interviews). These interviews however have not been cited in the thesis. The information provided was primarily used by the author to gain a more comprehensive insight into EU energy policy. Secondary sources include press releases and reports issued by the European Commission, journalistic reports (Euractiv, EUobsever, and Economist), and quantitative data issued by the Commission and international agencies. The breadth of the data collected is one of the main strengths of this research as it allows not only an inference into the preferences of both the Commission and the Member States but also an understanding of how these preferences drive the actors' behaviour.

Data was analysed through the process-tracing method, a method used extensively in principal-agent studies (Pollack 2003). Process-tracing is particularly useful as it "attempts to identify the intervening causal process – the causal chain and causal mechanism(s) – between an independent variable – or variables – and the outcome of the dependent variable" (George 2005). For this reason, this method is deemed useful to address the research question about the conditions (independent variables) that make the Commission's deviation from the preferences of the Member States (dependent variable) change.

To summarise therefore, this thesis uses a qualitative case study method in conjunction with process-tracing to explain how the preference alignment among the principals (IV1), and the preference alignment between the principals and the agent (IV2), affects the Commission's deviation from the preferences of the Member States (DV).

1.7. Thesis outline

This thesis is structured as follows. Chapter 2 presents the **theoretical framework** of this research which is the Principal-Agent Model (PAM) of delegation. The chapter presents the main assumptions and concepts of the Model, notably, 1) the reasons for delegation and the functions to be delegated, 2) the concepts of interests and preferences; the concept of agency losses, 4) control mechanisms, 5) autonomy and

discretion and 6) agency behaviour. The chapter also reviews other theoretical approaches that present at least one of these criteria and might plausibly address the research question of this thesis.

Chapter 3 presents the **research design and methods** and operationalises the main concepts of this research into concrete and measurable variables: the Commission's deviation from the preferences of the Member States (DV), the *preference alignment among the principals* (IV1) and the *preference alignment between the principals and the agent* (IV2). The chapter introduces Milner's (1997) distinction between *interest* and *preferences* and explains how they are defined for the purpose of this research. The chapter also proposes a categorisation of the agent's behaviour which will be revisited at the end of this thesis. Finally, the main methodological choices, a qualitative case study method and process-tracing method, are explained.

Four empirical chapters then look at four case studies. **Chapter 4** analyses *Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy*. The Decision introduced a mechanism for the exchange of information among the Member States and between the Member States and the Commission as far as intergovernmental agreements (IGAs) signed between Member States and third countries are concerned. This case suggests that the *Member States had homogeneous preferences* on this case (IV1) and that their preferences were *heterogeneous with those of the Commission* (IV2). Indeed, the Commission issued a very ambitious proposal that triggered some strong reactions among Member States. This case therefore, allows the analysis of how the homogeneity of *preferences* among the principals and the heterogeneity of preferences between the principals and the agent affected the Commission's deviation from the preferences of Member States.

Chapter 5 analyses *Directive 2009/73/EC concerning common rules for the internal market in natural gas*. In this case, the Commission proposed Ownership Unbundling (OU) as the best means to achieve the separation of supply and production activities from network operation in the gas market. The Commission's proposal was expected to have important consequences for the relations between Member States and non-EU

countries and triggered strong opposition from Member States. Member States also had very different preferences about unbundling due to the different structures of their national gas markets (IV1). For this reason, the chapter identifies a *small subset of Member States sharing homogenous preferences* and suggests that the *preferences of the Member States were heterogeneous with those of the Commission* (IV2). The case, therefore, allows analysis of how these values of the independent variables affected the Commission deviation from the preferences of the Member States (DV).

Chapter 6 looks at the *Energy Community Treaty (EnCT)* which was signed by the European Community and nine Contracting Parties of South-East Europe in 2005 and aimed to extend the EU internal energy policy to those countries. One of the most important features of the EnCT is that the EC/EU, including its Member States, is Party to the Treaty while individual Member States are not parties of the Treaty on their own. This chapter shows that the preferences among the Member States were *homogenous* on this case (IV1) and so were the *preferences* between the Member States and the Commission (IV2). The chapter analyses how these factors affected the Commission's behaviour (DV).

Chapter 7 looks at the *Energy Charter Treaty (ECT)* which was signed by fifty states and the European Community in 1994. The ECT provides a multilateral framework for energy cooperation concerned with the promotion and protection of trade, investment, and the transit of energy goods. As far as EU Member States are concerned, preliminary research suggests that they have *different preferences* when it comes to the ECT (IV1). For this reason, the chapter identifies a *small subset of Member States sharing homogenous preferences* and suggests that the preferences of the Member States were *homogeneous with those of the Commission* (IV2). The chapter analyses how these values of the independent variables affect the Commission's deviation from the preferences of the Member States (DV).

Finally, **chapter 8** concludes by summarising the main findings of this thesis and their implications. It revisits the main assumption of the PAM used in this thesis in light of the analysis conducted in the empirical chapters. The conclusion highlights in particular how this thesis seeks to contribute to the PAM. It also stresses some of the

shortcomings of the Model and, at the same time, highlights some plausible avenues for future research.

Chapter 2 Theoretical Framework Explaining the external dimension of EU Energy Policy: the Principal-Agent Model

2.1. Introduction

This chapter presents the theoretical framework of this research, the Principal- Agent Model (PAM) of delegation. It starts with a brief account of the research question being investigated and looks at the variables of this research, highlighting the analytical criteria that a suitable theoretical framework should have in order to address the research question of this study.

The research question[3] focuses on three main points: a) the Commission's behaviour in energy policy and its deviation from the *preferences* of the Member States, b) the conditions under which the Commission is likely to deviate from the *preferences* of the Member States and c) the Commission behaviour vis-à-vis the *preferences* of the Member States. The research question suggests that the concept of *preferences* is particularly important for the purpose of this research. This chapter then proceeds to identifying three main analytical criteria of a suitable theoretical framework. In particular, the theoretical framework needs to duly take into account: a) the role of the Commission as an actor; b) the role of Member States and c) the relations between the Commission and Member States.

[3] Under what conditions does the European Commission try to deviate from Member States' preferences in the external dimension of the EU internal energy market?

Starting from these criteria, the PAM is presented as the most suitable theoretical framework. The main assumption of the model and the hypotheses developed so far in the literature are presented in section 2.3. and consider the following aspects: 1) the reasons for delegation and the functions to be delegated, 2) the concepts of *interests* and *preferences*; 3) the concept of agency losses, 4) control mechanisms, 5) autonomy and discretion and 6) agency behaviour.

Section 2.4. looks at other theoretical approaches that are deemed plausible but which are not as suitable as the PAM for the purpose of this research. The review of these approaches is structured on three subsections reflecting the three analytical criteria described above in the introduction (chapter 1). The first subsection (2.4.1.) looks at actor-centric theories (Neofunctionalism and Rational Choice Institutionalism), the second (2.4.2.) looks at state-centred theories (Intergovernmentalism and its variant Liberal Intergovernmentalism), and finally, a third section (2.4.3.) looks at theories that provide an account on inter-institutional relations such as Multi-Level Governance (MLG).

2.2. Analytical criteria for a theoretical framework

The previous chapter has highlighted the main features of the puzzle which this research aims to address. It has stressed that the main aim of this thesis is to explain the Commission's behaviour in the external dimension of EU energy policy. This chapter aims to outline the rationale underlying the theoretical framework chosen for this research. This section therefore provides a brief account of the research question, and further explains the essential variables of this study. The general criteria for a useful theoretical framework are then illustrated.

The literature stresses two points about the Commission's behaviour in the external dimension of EU energy policy. On the one hand, scholars argue that the Commission plays an "active role" in the external dimension of EU energy policy. This happens in various ways, such as the Commission's attempts at "externalising" internal energy market principles in neighbouring countries or in speeding up its output to push for a common energy policy (Prange-Gstöhl 2009; Riley 2012; McGowan 2008; Mayer 2008; Baumann and Simmerl 2011). In contrast however, scholars also stress the

persistence of Member States in conducting their own foreign energy policies and in maintaining national control over energy (Buchan 2010a; Andoura, Hancher, and Van Der Woude 2011). This situation raises several questions about the role the Commission plays in the external dimension of the EU's energy policy and the relationship between the Commission and the Member States as actors with diverging interests. Is the Commission actually playing an active role in a way undesired by the Member States? In more analytical terms, *under what conditions does the European Commission try to deviate from Member States' preferences in the external dimension of the EU internal energy market*?

This research question carries at least three important points. Firstly, the phenomenon that this research aims to explain is the Commission's behaviour in energy policy. This will be operationalized as the dependent variable "Commission's deviation from the Member States' *preferences*" in the research design of this thesis (Chapter 3). Secondly, the research looks at the conditions that might make the dependent variable change. As will become clearer in Chapter 3, these conditions are the *preference* alignment among the Member States (IV1) and the *preference* alignment between the Member States and the Commission (IV2). This point also stresses that Member States are particularly relevant in the research puzzle. It also stresses that the concept of *preferences* is key in this research as *preferences* are expected to drive the actors of this study. Thirdly, the research question suggests that the relationship between the Commission and Member States is also important for understanding the external dimension of the EU internal energy market.

A theoretical framework then, needs to take into account all these factors and to satisfy the following criteria: firstly, the theoretical framework needs to be actor-centric, looking at the role of institutions. On this point, Rational Choice Institutionalism seem to be suitable as it provides an account for the role of institutions and supranational actors. Secondly, a suitable theoretical framework needs to take into account the role of Member States. In this case, state-centric theories such as Functionalism, Neo-functionalism or Liberal Intergovernmentalism might contribute as they stress the role of national governments. Thirdly, the relationship between the Commission and Member States also has to be explained, in particular, the dynamics of conflict and

cooperation existing between these actors. In this case, Multi-Level Governance may also contribute.

To summarise, the research suggests three analytical criteria that a theoretical framework suitable for this research needs to meet. In the following section (2.3.), the PAM is presented as the theoretical model chosen for this research. Section 2.4. then reviews other theoretical approaches that might also be plausible in answering the research question.

2.3. The Principal-Agent Model of Delegation (PAM)

The Principal-Agent Model (PAM) of Delegation originated in the field of the new economics of organization (Moe 1984) and was then applied to give an account of the delegation of power in the American Congress (Kiewiet and McCubbins 1991; McCubbins and Page 1987; McCubbins and Schwartz 1984; McCubbins, Noll, and Weingast 1987). The core argument of the PAM is simple and straightforward. The model is an analytical expression of the agency relationship in which one part, the principal, considers entering a contractual agreement with another, the agent, in the expectation that the agent will subsequently choose actions that produce outcomes desired by the principal (Moe 1984, 756). Examples of principal-agent relationships are lawyer-client, doctor-patient, broker-investor, politician-citizen and employee-employer relationships (Ibid).

Recently, the model has been applied in the study of the EU (see, i.a., Egan 1998; Franchino 2001; Garrett 1992; Garrett and Weingast, 1993; Kassim and Menon 2003; Moravcsik 1998; Moravcsik 1993; Pierson 1996; Pollack 1997; Pollack 2003; Pollack 2006). Indeed, several scholars have deemed the model suitable in explaining the delegation occurring between EU member governments (principals) and a number of supranational organisations (agents) that Member States have created and to whom have been allocated increasing power and discretions (Pollack 2006, 165). The model satisfies the analytical criteria described in the previous section as it provides an account for the Commission as an actor, explains the role of national governments, and provides analytical tools to analyse the relation between the Commission and the Member States.

This section aims to provide an overview of the PAM, focusing on the main assumptions, concepts, hypotheses and variables offered by the literature and informing this research. The section is structured as follows. Firstly, an account of the reasons for delegation and the functions likely to be delegated is offered (2.3.1.). Secondly, the concepts of *interests* and *preferences* are described as they are key for the purpose of this concept (2.3.2.). The PA literature on *preferences* is supplemented with Milner's distinction between *interest* and *preferences*. The distinction allows not only an investigation of the PA assumption of different *preferences* existing between the principals and the agent, but also accounts for some homogeneity of *preferences*. Thirdly, the side-effects of delegation are presented in a subsection on agency losses (2.3.3.). The section proceeds by looking at the control mechanisms which principals might use to control the agent (2.3.4.) and at the concepts of autonomy and discretion (2.3.5.). Finally, the section turns to the actual post-delegation agency behaviour and considers the main hypotheses offered in the literature (2.3.6.).

2.3.1. Reasons for delegation and functions to be delegated

The act of delegation is a constitution, treaty, legislation or other type of contract between a principal and an agent that establishes the parameters of acceptable agent behaviour (Pollack 2003, 28). Delegation can be defined more broadly as "a conditional grant of authority from a principal to an agent that empowers the latter to act on behalf of the former" (Hawkins et al. 2006, 7). Similarly, the relations between a principal and an agent are always governed by a contract, even if this agreement is implicit or informal (Ibid). This section addresses two main questions about the principal-agent relationship. The first question concerns the reasons why a principal should consider entering in a contractual agreement with an agent. The second question looks at the functions that principals may decide to delegate to an agent.

There can be several reasons for delegation. According to the literature, the *reduction of transaction cost* involved in the making of public policy is the most important motive of delegation. Some transaction costs are *informational*, such as when principals face a complex environment and require technical information and expert advice in order to elaborate effective policies (Epstein and O'Halloran, 1999; Huber and Shipan 2000). Others are related to credible commitment: principals may find it

convenient to commit themselves to certain kinds of policies but they cannot bind themselves to maintain those policies in the future. For this reason, they delegate power to bureaucratic agencies that are independent and insulated from electoral pressures (Moravcsik 1998; Huber and Shipan 2000).

As far as the motivation for delegation and discretion in the EU are concerned, Pollack's findings suggest that with treaty-based delegation, the demand for credible commitment is the primary motivation (see also Moravcsik (1998) and Majone (2001)). By contrast, secondary legislation is better explained by a mix of motivations with some areas of high discretion (competition policy, external trade) reflecting a logic of credible commitment while other areas (agriculture, fisheries) suggest a demand for speedy and efficient decision-making (Pollack 2003, 152). Finally, the discretion of the Commission also varies across both functions and issue areas. As far as function is concerned, the Commission enjoys its greatest discretion in the monitoring of Member States' compliance with the treaties, while discretion in regulatory and agenda setting powers varies across issue-areas. More precisely, the Commission is subjected to varying degrees of administrative procedures and oversight ranging from the Commission's broad discretion in competition policy to its more constrained role in sensitive areas such as national regulation, taxation and foreign affairs (Ibid).

The functions to be delegated can also be different. Pollack (2003, 21) argues that principals may delegate four key functions or powers to their agents. Firstly, principals may create an agent to *monitor* individual compliance with agreements between them, and provide information about compliance to all participants. By doing this, they reduce the transaction costs and encourage cooperation. Secondly, agents are created to solve problems of *incomplete contracting*. Institutional agreements may be theorised as contracts. Contracts are invariably incomplete as they do not spell out in detail the obligation of the parties in all circumstances and throughout the duration of the contract. Parties, then, may decide to delegate the elaboration and the amendment of agreements and the arbitration of disputes to an agent. The agent is then expected to impartially interpret the agreement that the principals signed, fill in the details of an incomplete contract, or adjudicate disputes. Thirdly, principals may delegate the agent

to *adopt credible, expert regulation* of economic activities in areas where the principals would be either ill-informed or biased. A classic example is the delegation by national legislators of monetary authority to an independent central bank. Finally, principals may delegate powers of formal *agenda-setting* so as to avoid the endless "cycling" of policy alternatives that might otherwise result from the possession of agenda-setting power by the principals themselves.

In summary, the PA literature argues that delegation may occur in order to reduce the transaction costs that result from the making of public policy. These costs may be informational or related to a problem of credible commitment. In order to reduce transaction costs, the agents are delegated four main functions: a) monitoring compliance, b) filling in incomplete contracts, c) providing expert and credible regulation, and d) setting the formal agenda for legislation. Once delegation has occurred, however, some side-effects might arise as the principals and the agent have different *preferences*. This latter point is the core of the principal-agent problem. Before looking at the side-effects of delegation more in depth (2.3.3.), the next sub-section (2.3.2.), looks at the concepts of *interests* and *preferences*.

2.3.2. Interests and preferences

One of the main assumptions of the model is that the principals and the agent have different preferences or interests. Both terms are used in the literature. Pollack, for instance, states that "once created […] supranational agents develop their own distinct preferences" (Pollack 2003, 19). In explaining this concept further, however, he quotes Kiewiet and McCubbins (1991, 5) who argue that "there is always some conflict between the interests of those who delegate authority (principals) and the agents to whom they delegate it. Agents behave opportunistically, pursuing their own interests subject only to the constraints imposed by their relationship to the principals". Building on Rational Choice Institutionalism, PA literature takes preferences or interests as givens, assuming that "actors have a fixed set of preferences or tastes" and that they "behave instrumentally as to maximize the attainment of these preferences" (Hall and Taylor 1996, 944–5).

This research starts from the assumption that not all of these "tastes" are equally fixed or given: some desires and wants are fixed while others might change. For this reason, Milner's distinction between *interests* and *preferences* (1997, 7) seems particularly useful for the purpose of this study.[4] Milner defines *interests* as "fundamental goals, which change little". On the contrary, *preferences* derive from *interests* and refer to "the specific policy choice that actors believe will maximise either their income or chances of re-election on a particular issue". Milner's distinction is particularly useful for the purpose of this study because it allows the reconciliation of this research with the broader Rational Choice literature, as *interests* can be seen as given and exogenous but *preferences* can be seen as endogenous. They therefore need to be inferred empirically on a case-by-case basis. Doing so accounts for those situations where the principals and the agent might agree on some *preferences* (specific policy choices) and yet ultimately pursue different *interests* (fundamental goals). Analysing these kinds of situations would contribute to the PAM, most of which only assumes that the principals and the agent always have different interests or preferences. The difference between the *interest* and *preferences*, together with their operationalization, is explained more in detail in section 3.4. Just now, it is important to say that this thesis shares the PA assumption that the principals and the agent have different interests (Pollack 2003, 19; Kiewiet and McCubbins 1991, 5). It introduces, however, an additional level of analysis in applying Milner's distinction between *interests* and *preferences*. In doing so, this study acknowledges that some instances of common *preferences* and yet divergent *interest* between the principals and the agent might occur. In the next section (2.3.3.) the consequences of the assumption of different *preferences* between the principals and the agent are explained in detail.

2.3.3. Agency losses

The assumption that principals and agents have different interests and preferences means that "there is almost always some conflict between the interests of those who delegate authority (principals) and the agents to whom they delegate it" (Kiewiet and

[4] This distinction has been used before in the PA literature (see Delreux 2001; Damro 2006). For the purpose of this thesis, I use the italics - *preferences* and *interests* – to indicate that I am using the terms as defined by Milner (1997). When the italics is not used – preference and interests – I am referring the concepts as defined by PA literature more broadly or by the specific author cited.

McCubbins 1991, 5). Thus, there is no guarantee that the agent, once hired, will in fact choose to pursue the principal's best interest or do so efficiently. According to the rationalist framework adopted for this research, this can be explained on the basis that the agent has their own interests at heart, and is induced to pursue the principal's objectives only to the extent that the incentive structure imposed in their contract renders such behaviours advantageous (Moe 1984). These side effects of delegation are known as "agency losses" (Kiewiet and McCubbins 1991, 5).

PA scholars have used many terms to refer to agency losses such as *bureaucratic drift* (Epstein and O'Halloran 1999), *political drift* (Keleman 2002), and *shirking* and *slippage* (Pollack 2003). *Bureaucratic drift* refers to "the ability of an agency or other executive actors to enact outcomes different from the policies preferred by those who originally delegated power" (Epstein and O'Halloran 1994, 699). On the other hand, a *political drift* occurs if, for instance, "future holders of public authority direct a bureaucratic agency to pursue objectives different from those of the political coalition that originally delegated authority to the agency" (Keleman 2002, 96). *Shirking* and *slippage* are by far the most common terms in the literature and they are often used in conjunction. *Shirking* is the "bureaucratic drift" which occurs when "agents behave opportunistically, pursuing their own interests subject only to the constraints imposed by their relationship with the principal" (Pollack 1997, 108; quoting Kiewiet and McCubbins 1991, 5). *Slippage* seems to occur when the structure of delegation itself provides perverse incentives for the agent to behave in ways inimical to the preferences of the principals (Ibid). The difference between the two then, is that while *shirking* depends on "conflicting interests" between the principals and the agent (Da Conceição 2010, 1108–9) and the "opportunism" (Kerremans 2006, 165) of the latter, *slippage* is the result of the "delegation structure" (Da Conceição 2010, 1108–9) and "incentives" (Kerremans 2006, 165). This distinction, however, is not always clear in the literature. As stated by Kerremans himself, a situation in which the Commission exceeds the negotiating directives that the Council may have defined, could be described as both *slippage* and *shirking*. It could be *slippage* as "a narrow negotiating mandate may make it impossible for the Commission to really negotiate with the EU's external partners", and "this may be seen as an incentive to slip into concessions not permitted

by the directives" (Ibid.). However, "it could also be interpreted as *shirking*, as the Commission could have been expected to convince its external partners to agree with an agreement that falls within the limits of the Council's negotiating directives. If that is the interpretation, the Commission could be seen to opportunistically exceeding the negotiating directives" (Ibid).

Regardless of the distinction between *shirking* and *slippage*, scholars have paid little attention to the question of why and how agency losses occur (Da Conceição 2010, 1108). It is on this point that this thesis contributes to PA literature. To explain Commission behaviour, Chapter 3 (Research Design) will operationalise the concept of agency losses as a concrete dependent variable. Subsequently, the factors likely to make the dependent variable changing are also operationalized. This research therefore aims to contribute to the PA debate on why and how agency losses occur and what they actually entail.

2.3.4. Control mechanisms

With agency losses being an unavoidable side effect of every delegation, the core challenge of a principal-agent relationship is for the principals to obtain maximal compliance from their agent (Moe 1984; Kassim and Menon 2003). In order to do so, principals have several control mechanisms at their disposal. The literature classifies them as *ex-ante*, *ex-post* and *ad locum* control mechanisms, depending on the stage of the delegation process at which they are used (for a classification of control mechanisms see also Gilardi 2001 and Franchino 2001). First, *ex-ante* control mechanisms are administrative procedures which define *ex-ante* the scope of the agency's activity, the legal instruments available to the agency and the procedures it must follow (McCubbins and Page 1987; Pollack 1997). Second, *ex-post* control mechanisms are oversight procedures that allow principals to monitor and influence agency behaviour through positive and negative sanctions. Furthermore, with regard to oversight procedures, it is possible to distinguish between *police patrol oversight* and *fire alarm oversight* (McCubbins and Schwartz 1984). The first category consists in active monitoring of the agent's behaviour by the principal. This category includes

comitology[5], public hearings, field observations and examination of regular agency reports. They all have a high cost to the principals as they entail active monitoring. Alternatively, in *fire alarm oversight*, principals rely on third parties (citizens, organised interests group) to monitor agency's activity and seek redress through appeal to the agent, to the principals or through judicial review. Examples of *fire-alarm oversight* are institutional checks in which a number of agencies are established with conflicting sets of incentives or organizational goals. In the EU system, Pollack argues, almost every institution besides the Commission plays a role in monitoring and checking the Commission's behaviour. With regard to the costs and credibility of *ex-post* sanctions, Pollack (1997) identifies four possible avenues for principals: cutting agencies' budgets; dismissing or refusing to reappoint agency personnel who are perceived to be drifting from the *preferences* of the principals; overruling a Commission or European Court of Justice decision through new Council legislation; and unilateral noncompliance with a decision of the Commission or the European Court of Justice.

Third and finally, Delreux (2011) and Kerremans (2006) illustrate a third category of control instruments called *ad locum* which Member States can use when the Commission negotiates at the international level. Delreux refers to two instruments:

a) Principal attending the international negotiations: if the international negotiation's rule of procedures allows Member States to attend, the principals are able to observe and control the agent's negotiation behaviour directly;
b) Coordination meetings: according to article 300 TEC, the Commission needs to consult a "special committee appointed by the Council". In this committee, Member States representatives meet during the negotiation stage. Kerremans, who illustrates the *ad locum* device from the perspective of the EU's external trade policy, defines it as "the activities of a committee of Member States'

[5] Comitology concerns the creation of committees used by the Council to control the Commission. Committees are of three types (advisory, management, regulatory) and provide for different levels of control (with the regulatory committee as the most effective). As is the case with all other control mechanisms however, committees are also costly to the principals as they present a clear and explicit trade-off between control, and speed/efficient decision making (Pollack 1997).

> representatives – Committee 133 – whose function is to closely control the Commission during the external negotiations" (2006, 178).

It must be borne in mind that the above categories are not static, and that principals can always develop new control mechanisms not yet foreseen by the PA literature. This point on control mechanisms will therefore also be revised in the conclusion of this thesis (Chapter 8).

Regardless of the category they belong to, the use of control mechanisms is usually costly and risky for principals. Firstly, imposing sanctions or strictly controlling the agent can negatively affect the ability of an agent to perform its tasks. Cutting an agency's budget, for example, might have a negative effect for member governments' domestic constituencies. Secondly, the use of control mechanisms can be very difficult in practice. Appointment of agency personnel in the EU institutions (e.g. Commissioners of the European Commission, judges of the European Court of Justice, Members of the European Parliament) is subject to rules that make it difficult to be used as a control mechanism. Overruling and noncompliance are also difficult to put into practice as, in the first case, a common view among principals is required and, in the second case, being an incompliant state is costly in terms of reputation among Member States, and bearing in mind that national courts have accepted the supremacy of EU law over national laws. The most effective and costly sanction however, would be revising the agent's mandate by amending the treaty or regulation that delegates authority. This is the ultimate threat and is costly to apply as the institutional barriers to carry it out are significant. However, some of the Commission's executive powers are established by Council regulations with fixed expiration dates that allow principals to cut back those powers. In this last case, it would be relatively easier for the principals to sanction their agents. Generally speaking however, every agency relationship entails a balance between the need for the principals to control the agent, and the requirement of providing the agent with the means to carry out their mandate.

In summary therefore, principals have several mechanisms (*ex-ante*, *ex-post* and *ad locum*) in order to control the agent. Controlling the agent however, is costly to the principals and the latter have to find a balance between delegation and control. It is

indeed this balance between delegation and control that makes for what the PA literature calls *autonomy* or *discretion*.

2.3.5. Autonomy and discretion

Autonomy is the range of potential independent action available to an agent after the principals have established control mechanisms (Hawkins et al. 2006, 8). *Discretion* is a dimension of the contract between principals and the agent (ibid). More precisely, *discretion* refers to the "characteristics of the act of delegation – that is, a constitution, treaty, legislation, or other type of contract – that establishes the parameters of acceptable agent behaviour" (Pollack 2003, 28).

The PA literature has developed many testable hypotheses about the degree of *discretion* allocated to the agents as well as about the *autonomy* which agents might enjoy (Pollack 2003). PA analysts have argued that the degree of *discretion* allocated to agents is dependent on several factors. Firstly, the uncertainty inherent in a given issue area can provide an incentive to principals to delegate in order to acquire information. Secondly, the difficulty of establishing credible commitments might also provide an incentive for principals to delegate in order to establish their commitment to a given line of policy over time. Finally, the degree of policy conflict might also influence delegation decisions, as principals would be most likely to delegate *discretion* where the degree of conflict is low both among and between themselves and their agents (Ibid, 34).

The PA literature has also developed hypotheses about what agents do with the *discretion* they are granted and which factors are likely to affect their behaviour. Literature on legislative delegation to agencies, for instance, stresses that the agent's *discretion* is a function of the *ex-ante* and *ex-post* control mechanisms established by the principals to control their agent in a given area (Ibid, 47). In line with this literature, this research therefore also looks at the post-delegation behaviour and how the agent uses *autonomy* and *discretion*. This point is analysed in more depth in the next sub-section.

2.3.6. Agency behaviour in the post-delegation phase

This research identifies the European Commission as an agent of the Member States, which are the principals. The Commission is delegated powers through both primary and secondary legislation. Considering the Commission as an agent, Pollack (2003) argues that according to the EU Treaties, the Commission has been delegated the following functions: a) setting the agenda for the EC legislative process; b) monitoring and enforcing primary and secondary EC law ('guardian of the treaties' role); and c) implementing policies adopted by the Council. Clearly these functions correspond closely to the functions mentioned earlier in this chapter (2.3.1.): agenda-setting, monitoring, enforcement and adoption of credible regulations. Pollack also offers an overview of the nature of control mechanisms adopted in the EC and EU treaties such as a) appointments and dismissal procedures, b) oversight procedures, c) administrative law and judicial review, d) the budget and e) institutional checks.

Several hypotheses about the powers delegated in primary and secondary legislation, together with the range of issue areas where delegation has occurred, have been tested in the literature (Pollack 2003; Majone 2001; Franchino 2001). Building on the work of Majone (2001) and Franchino (2001), Pollack (2003) stresses that the treaties explicitly delegate executive powers to the Commission in a relatively small range of issue areas, the most important of which are competition policy and the common commercial policy. In these areas the Commission is relatively unconstrained by the control mechanisms (Ibid, 101). With regard to secondary legislation however, Member States have delegated more executive powers to the Commission than in the treaties, where the terms of delegation would be more difficult to change and where shirking by the Commission more difficult to correct.

PA theory has also developed hypotheses about the actual behaviour of the agent once delegation has occurred. There is broad agreement that the behaviour of the agent is affected by two factors: a) the preferences of the agent itself and those of the principals and b) the control mechanisms used by the principals. *Ex-ante* and *ex-post* control mechanisms established by member state governments to control supranational agency in a given issue area, affect the discretion of the agent. As mentioned earlier in this chapter (2.3.5.) discretion can be defined as "the ability to pursue an integrationist

agenda and move policy outcomes beyond what member governments would collectively have decided" (Pollack 2003, 263). While control mechanisms have been analysed in section 2.3.4., this sub-section focuses on the role of *preferences*: whether the principals (the Member States) share the same *preferences* and whether the principals and the agent share the same *preferences*. These are two factors likely to affect the behaviour of the agent.

Existing research suggest that the preference alignment among the principals can affect the agent's discretion. When the principals have homogeneous preferences for example, the agent's discretion is understood to decrease (Delreux 2011; Pollack 2003; Hawkins et al. 2006). On the other hand, the autonomy of the agent increases when the principals have divergent interests (Elsig 2007, 931–2).[6] This is because the existence of divergent interests among the principals can impact the successful use of principal's control mechanisms vis-à-vis the agent. Regardless of the distinction between autonomy and discretion, the literature suggests that preferences among the principals affect agency behaviour.

The preference alignment between the principals and the agent is also duly taken into account in the literature (Pollack 1997; Da Conceição 2010; Delreux 2011). When principals have different preferences, the agent can "operate creatively" and "act autonomously" (Pollack 1997, 129). The agent could also "exploit" a given situation "to shirk within certain limits, exploiting cleavages among the Member States to avoid sanctions, Council overruling of decisions, or alteration of the agent's mandate". Moreover, having agenda-setting power, the Commission may also "push through those proposals closest to its own preferred policy that also can garner a qualified majority in the Council" (Ibid).

As any other theoretical model, PA also presents strengths and weaknesses. While the points discussed so far suggest that the model offers several strong analytical tools for analysis, some shortcomings are also present. Firstly, PA might be statics and simplistic. This is so because the model focuses on a relationship between an agent

[6] Elsig uses the phrasing "constellations of interests among the principals" (2007: 931-2) to refer to principals having divergent interests.

and principals neglecting other actors. Secondly, PA literature often assumes that the agent and the principals are unitary actors while this is not always the case. The Commission and the Member States are complex actors but in PA models they are assumed to be monolithic actors for the sake of simplification. Thirdly, most of the PA literature simply defines the agent behaviour in terms of deviation/not deviation without considering some more nuanced behaviour which might occur between these two opposite situations. Finally, the model misses that other factors – external to the principal-agent relationship – might affect the behaviour of the actors. In applying the PAM, therefore, both strengths and weaknesses need to be taken into account. Although the model presents some limitations it nonetheless provides strong explanatory power as outlined so far and summarised below.

The PAM helps to address the research question of this thesis in three particular ways. Firstly, it accounts for the Commission as an actor. The Commission is treated as an agent of the Member States but with specific interests and preferences which it will try to satisfy. Secondly, Member States are also accounted for, as they are deemed to delegate powers to the Commission in order to reduce transaction costs and satisfy their interests and preferences. For this reason, Member States as principals will control the agent (the Commission) using the control mechanisms at their disposal. Finally, the model allows the analysis of the principal-agent relationship where the Commission tries to satisfy its own preferences (agency losses). The model therefore not only provides analytical tools to look at the Commission's behaviour, but also to investigate the conditions that might affect that behaviour, notably, the preference alignment or constellation among the principals and the preference alignment between the principals and the agent.

2.4. Review of other theoretical approaches

The decision about an appropriate theoretical framework requires that alternative theoretical approaches are considered. This section reviews some theoretical approaches that meet the three criteria illustrated earlier in this chapter (2.2.) and are thus deemed plausible for the purpose of this research. The section concludes that although useful, none of the approaches is as suitable as the PAM for this research. An

exception is Rational Choice Institutionalism (reviewed in section 2.4.1.) from which the PAM stems.

2.4.1. Actor-centric theories: Neofunctionalism and Rational Choice Institutionalisms

Actor-centric theories look at institutions as actors. In this sense, Neofunctionalism and Rational Choice Institutionalisms provide analytical tools which might be useful to address the research question of this thesis about the Commission's behaviour. As is analysed further below however, Neofunctionalism fall short of explaining the entire picture of the inter-institutional relationship between the Commission and the Member States. Rational Choice Institutionalism, from which the PAM originates, is instead more useful in this sense.

Neofunctionalism

Neofunctionalism developed largely through the work of Ernst Haas (1958; 1964) and Lindberg (1963). Neofunctionalism is a classic integration theory that starts from the argument that European integration begins when two or more countries agree to work for integration in a given sector (sector A). They appoint a supranational bureaucracy – a "high authority" – to accomplish this task more effectively. Integration in the first sector creates functional linkage pressure for related sectors, as the full advantage of integration will not be achieved unless cognate sectors are involved in integration. The "high authority" becomes a key sponsor of European integration, and it develops a strategy to deepen integration in an expanding range of policy areas. Moreover, it seeks to increase its institutionalization at the regional level. The "high authority" is seen as "entrepreneurial" as it acts as a constant advocate of integration and may sponsor the emergence of regional-level interests associations (Ibid).

A second important feature of Neofunctionalism is the concept of 'spillover'. Spillover is the way in which the creation and deepening of integration in one policy area would create pressure for further integration within and beyond that sector (Haas 1958). Consequently, greater authoritative capacity at the European level would also occur (Ibid). A further definition is provided by Lindberg (1963, 10): "a situation in which a given action, related to a specific goal, creates a situation in which the original goal

can be assured only by taking further actions, which in turn create a further condition and a need for more action and so forth". Hence, Neofunctionalism illustrates a process of functional spillover in which sectoral integration produces the unintended consequence of promoting further integration in additional issue areas (Haas 1964; Lindberg and Scheingold 1970). Moreover, this process of functional spillover is complemented by a political spillover in which supranational and subnational actors create additional pressures for further integration. Spillover, however, is not completely automatic but requires a measure of political activism. Eventually, the concept of "cultivated spillover" emphasises the role of a group of states in international organisation which, if left to their own devices, will bargain down to a lowest common denominator position (Ibid).

According to neofunctionalists then, the driving forces of integration are non-state actors rather than sovereign nation-states. On the one hand, domestic social interests (such as business associations, trade unions and political parties) press for further policy integration to promote their economic or ideological interests; these subnational actors appreciate the benefits from integration and transfer their demands, expectations and loyalties to a new centre. This new centre, on the other hand, is constituted by supranational actors (the European institutions and particularly the Commission), which argue for the delegation of more powers in order to increase their influence over policy outcomes.

The neofunctionalist approach has been applied in European studies including the study of political integration in the social policy and labour market field (Strøby Jensen 2000) or the expansion of EU competencies in health policy (Greer 2006). Probably the most important reappraisal of Neofunctionalism has been written by Rosamond (2005), who has argued that its conceptual repertoire can contribute to EU studies and comparative regionalism.

Although significant because of its focus on non-state actors, Neofunctionalism remains a meta-theory of integration and can add little to the PAM. The neofunctionalist argument about additional pressure for further integration by supranational actors (notably the European Commission (Haas 1961; Lindberg and

Scheingold 1970)), is reasonable. This approach however underestimates that national governments can have preferences against further integration and that they can act in order to prevent such further integration occurring. In addition, neofunctionalists overestimate the role of non-state actors and assume their preference for further integration which may or may not be accurate. Neofunctionalism therefore provides analytical tools to look at the subnational and supranational level. The role of national governments however, is almost dismissed. For this reason, this theoretical framework can only partly contribute to this research.

Rational Choice Institutionalism

Rational Choice Institutionalism (RCI) is one of the so-called three New Institutionalisms (together with Historical Institutionalism (HI) and Sociological Institutionalism (SI)) which developed in the early 1980s as an alternative to the debate between Neofunctionalism and Intergovernmentalism (March and Olsen 1989; Hall and Taylor 1996). Given its analytical focus on institutions, RCI satisfy the first of the three analytical criteria presented earlier in this chapter as it allows consideration of the European Commission as an actor.

Hall and Taylor (1996, 945–6) emphasize four notable features of RCI. Firstly, it starts from the behavioural assumptions that relevant actors have a set of preferences or tastes, and that they behave instrumentally and strategically in order to maximise the attainment of these preferences. Secondly, it sees politics as a series of collective action dilemmas in which individuals acting to maximise the attainment of their own preferences are likely to produce an outcome that is collectively suboptimal. Thirdly, it postulates that actors' behaviour is driven by a strategic calculus which, in turn, will be affected by the actor's expectations about other actors' behaviour. Finally, the actors create institutions because they perform specific functions and minimize transaction, production or influence costs.

These four assumptions have been tested by American political scientists in the study of the origins and effects of US Congressional institutions on legislative behaviour and policy outcomes (Moe 1984; Kiewiet and McCubbins 1991). The insights of RCI have also been applied to the study of the EU. More precisely, EU studies have focused on

the analysis of institutional reforms and the subsequent redistribution of power among the competing actors. Scholars have in particular focused on the introduction of the cooperation procedure (Steunenberg 1994; Moser 1997) and the study of single institutions such as the European Parliament (Tsebelis 1994) and the European Court of Justice (Garrett 1992). More importantly for this research, is from RCI that the PAM stems. Initially developed by American political scientists in the 1970s (Kassim and Menon 2003), the model has been applied to study the Community's comitology procedure (Gerus 1991), the Community standardization bodies (Egan 1994), and the role of the European Court of Justice as an agent of the Member States (Garret (1992); Garrett and Weingast 1993; Kilroy 1995). Other scholars have used the model to analyse specific policy areas such as regulatory policies (Majone 2000), telecommunication policy (Thatcher 2001) and migration policy (Stetter 2000). The PAM has also been applied to the study of EU external representation (Da Conceição 2010; Eugenia Da Conceição-Heldt 2011; Eugénia Da Conceição-Heldt 2011; Damro 2006; Damro 2007; Delreux 2011; Elsig 2011).

RCI can thus speak to the theoretical model of this research as it provides analytical tools to look at the role of institutions. In particular, RCI also provides a theoretical framework to look at inter-institutional relations.

2.4.2. State-centric theories: Intergovernmentalism and Liberal Intergovernmentalism

A deeper insight on the role of national governments is offered by Intergovernmentalism and its variant Liberal Intergovernmentalism. This theory emerged after the developments of the 1960s and 1970s that seemed to demonstrate the limits of Neofunctionalism in giving an account of the integration process.

The first Intergovernmentalist was probably Hoffmann (1966), who declared the nation state not "obsolete" but "obstinate". This is to say that, contrary to what neo-functionalists affirmed about the shift of authority from Member States to a new centre, Hoffmann postulated that states still played a fundamental role in Europe. Hoffman emphasised the central role of nation-states and the importance of national interests in driving European integration. The main aim of governments is to protect their

geopolitical interests (for example, national security and sovereignty). Interests are defined as "constructs in which ideas and ideals, precedents and past experiences, and domestic forces and rulers all play a role" (Hoffmann 1995: 5). Any international system would be likely not to produce integration among units, as argued by neofunctionalists, but rather diversity, as situations and domestic interests vary across states: "in areas of key importance to the national interest, nations prefer the certainty, or the self-controlled uncertainty, of national self-reliance, to the uncontrolled uncertainty of the untested blunder" (Hoffmann 1966, 882). These aspects in part explain the difficulties in getting further with political integration during the 1960s. A further explanation lies in the distinction between "high" and "low" politics: integration is possible in certain technocratic and uncontroversial areas but is likely to generate a conflict in matters where the autonomy of governments or components of national identity are at stake. Moreover, Hoffman criticised the concept of spillover and the automaticity of integration as, in his opinion, national interests and the centrality of state actors would play a decisive role.

Building on Hoffmann's Intergovernmentalism, Moravcsik developed the Liberal Intergovernmentalist theory of European integration (Moravcsik 1993; Moravcsik 1998). His central argument is that "European integration can best be explained as a series of rational choices made by national leaders. These choices responded to constraints and opportunities stemming from the economic interests of powerful domestic constituents, the relative power of each state in the international system and the role of international institutions in bolstering the credibility of interstate commitments" (Moravcsik 1998, 18). Like Hoffman, Moravcsik emphasises the power and preferences of EU member states but he goes more in-depth by employing a rationalist framework which allows disaggregation of the phenomenon he seeks to explain into elements, which can be treated separately and with different theories. According to this rationalist framework, international negotiations consist of three stages explained by three different theories: national preference formation, interstate bargaining and institutional choice (Ibid, 21).

In the first stage, governments formulate a consistent set of national preferences. With the term "preferences", Moravcsik designates "not simply a particular set of policy

goals but a set of underlying national objectives independent of any particular negotiations to expand exports, to enhance security vis-à-vis any particular threat, or to realize those national preferences more efficiently than do unilateral actions". In the second stage, states develop strategies and bargain with one another at the supranational level in order to reach substantive agreements that help to further their national preferences in a more efficient way than unilateral actions. Finally, they decide to delegate or pool sovereignty to international institutions in order to secure the agreements they have made and increase the credibility of their mutual commitments. According to Moravcsik then, European integration was not driven by an entrepreneurial Commission or by an unintended spillover. Rather, it was driven by a gradual process of preference convergence among the most powerful member states. These states succeeded in doing this by bargaining among themselves, offering side-payments to smaller states and delegating limited power to supranational organisations (Ibid).

As indicated above, Moravcsik uses alternative theories and hypotheses for each of the three stages. In order to explain variation in national preferences, he evaluates theories based on geopolitical and economic interests. For the second stage (interstate bargaining), he evaluates theories that stress supranational entrepreneurship and interstate power. Finally, Moravcsik uses theories that stress federalist ideology, the greater efficiency of centralising the generation of technocratic information, and the need to increase the credibility of national commitments.

Although Moravcsik does take into account the role of national governments and the delegation of power from Member States to supranational institutions and provides a very rich theory on preference formation, some aspects make this approach insufficient to answer the research question this thesis is addressing. Firstly, it is not Moravcsik's aim to provide a comprehensive account of problems that occur within delegation, such as conflicting interests or agency losses, which this thesis aims to do. Secondly, Moravcsik does not look at the role of the Commission as policy entrepreneur: even though "most states are likely to consider a supranational body to be more neutral than even a randomly chosen national government" (Moravcsik 1993, 512), this does not necessarily imply that the Commission will in practice act neutrally (Kassim and

Menon 2003, 127–8). Because of this, is seems unlikely that this theoretical approach could explain the tension that exists between the Commission and the Member States. Moreover, Intergovernmentalism underestimates the role of the Commission in the same way that Neofunctionalism underestimates the role of national governments. This dichotomy must be overcome in order to provide an account of the relation between the Commission and the Member States.

2.4.3. Inter-institutional relations: Multi-Level Governance (MLG)

The main difference between the governance approach and classic integration theories is in the way they look at the EU itself. While the latter asks how and why the Euro-polity came into existence, the governance approach takes the Euro-polity as given and looks at its impact on national and European policies and politics (Jachtenfuchs 2001).[7] The MLG approach argues that "European integration is a polity-creating process in which authority and policy-making influence are shared across multiple levels of government – subnational, national, and supranational" (Marks et al. 1996, 342). In contrast to the classical theories of integration, the MLG not only restates the importance of the supranational institutions but also looks at the relations between them and the national level. As such, it seems a plausible approach for addressing the research question of this project and is therefore worthy of review.

MLG can be described according to three main features (Ibid). Firstly, decision making competencies are not monopolized by state executives but shared by actors at different levels. Supranational institutions such as the European Commission, the European Court and the European Parliament therefore have an independent influence in policy-making that is not merely a direct consequence of their role as agents of state executives. Second, individual state executives might lose control in the collective decision-making process. This is because Decisions concerning rules to be enforced across the EU involve gains or losses for individual states. Third, political arenas are

[7] For the sake of clarity it should be noted that the label "governance" includes a great variety of ideas and positions among scholars: some of them refer to their studies as "supranational", other as "Multi-Level Governance" (Marks, Hooghe, & Blank 1996; Jachtenfuchs 2001; Bache & Flinders 2004; Sweet & Sandholtz 1997). This thesis uses the label "Multi-Level Governance" as it seems to be the most common and prominent in the governance literature.

interconnected rather than nested. This means that although national arenas are important for the formation of state executive preferences, states are no longer the only interface between the supranational and subnational arenas. States share control with subnational actors who operate in both national and supranational arenas and create transnational associations.

Starting from these premises, MLG focuses, among other things, on the impact of the EU on the domestic affairs of its Member States and vice versa. In this debate, three major lines have developed in the literature: the Europeanization of policies and politics, the rise of regulatory policy-making and the emergence of a new mode of governance (Jachtenfuchs 2001).[8] An important aspect of MLG is that it provides a clear distinction between institutions and actors. That is to say, a distinction between the state and the EU as sets of rules on one side, and the particular individuals, groups and organizations which act within those institutions on the other. Based on this assumption Marks et al. (1996) argue that the key actors in European decision-making are not the whole states or national governments but elected domestic politicians. The executive branch of national government will not necessarily give priority to sustaining the state as an institution. In contrast, it will focus on the implementation of the goals which will depend, among other things, on winning the next election. Government leaders then decide to shift decision-making at the supranational level. This might happen for several reasons but the main argument is that national governments are constrained in their ability to control the supranational institutions they created at the European level (Ibid, 340).

[8] *Europeanization* may be defined as the degree to which public policies are carried out either by the Member State alone, jointly by Member States and the EU, or exclusively by the EU (Ibid. 2001:250). Scholars argue that "joint policy decision-making seems to be both a general and a fairly stable pattern" (Ibid). Moreover, in describing the EU as a "*regulatory-state*" some scholars argue that the creation of a European market requires constant regulation together with a high degree of specialized technical knowledge, and that the institutions, particularly the Commission, the Court and the regulatory agencies, can be an "independent fourth branch of government" or "non-majoritarian institutions" (Majone 1994, 1996 quoted in Jachtenfuchs 2001: 253). The role of institutions is confirmed in the *network governance* literature, which focuses on informal and loose structures that extend across and beyond hierarchies. This approach has often been applied to the analysis of multi-level governance in the EU (Marks 1992; Kohler-Koch 1999).

MLG demonstrate some elements that are a typical field of analysis of the PAM. The ability of Member States executives, as principals, to control supranational agents, is constrained by several factors such as the multiplicity of principals, the mistrust that exists among them, impediments to coherent principal action, informational asymmetries between principals and agents and by the unintended consequences of institutional change (Ibid, 353-4). Marks et al. also look at different stages of the policy making processes in the EU, and highlight the important role of supranational institutions, particularly the Commission, and the loss of control by national governments. They argue that "EU decision-making can be characterized as one of multiple, intermeshing competencies, complementary policy functions, and variable lines of authority – features that are elements of multi-level governance" (Ibid, 364). Taking the policy initiation stage as an example, they emphasise the role of subnational authorities in mobilising at the supranational level and pushing for certain initiatives and, in doing so, in influencing the process of agenda-setting. They also show however that the Commission is a critical actor in the policy initiation phase as it can use its alacrity and present national governments with a *fait accompli*. These scholars conclude that supranational institutions are decisive actors but are not the only ones: the system is one of multi-level governance characterized by mutual dependence, complementary functions and overlapping competencies.

Multi-Level Governance thus appears to be able to take into account the tension between the supranational and intergovernmental level. As a stable equilibrium is lacking, the allocation of competencies between national and supranational actors is ambiguous and contested. However, there are several elements that make this approach unsuitable for this research. Some criticisms of this approach are well illustrated by George (2004). Multi-Level Governance sometimes overestimates the role of subnational actors stating that the relations between the latter and the Commission are advantageous for subnational actors. This might happen for some policy areas such as structural policy, but there are instances such as state aid, where subnational actors are more constrained rather than strengthened. This was proven, for example, by the relations between the German Land of Saxony and the Commission on state aid given to Volkswagen (Thielemann quoted in George (2004)). A second criticism is that MLG

mistakes evidence of subnational authority mobilisation at European levels with evidence of influence. The existence of extra-state channels of access to the EU, such as the Committee of Regions, does not necessarily mean that subnational actors have an impact on EU policy. This might be true but lacks empirical evidence.

In conclusion, the theoretical approaches reviewed so far can only partially address the research question of this thesis as each of them only satisfies one of the analytical criteria described earlier in this chapter. An exception is constituted by Rational Choice Institutionalism from which the PA stems. The PAM is therefore the main theoretical framework for this study.

2.5. Conclusion

This chapter has focused on three main points. Firstly, the introductory section recalled the main aim of this research, which is to explain the behaviour of the European Commission in energy policy. This aim was expressed in the following research question: *under what conditions does the European Commission deviate from Member States' preferences in the external dimension of the EU internal energy market*? Developing from this research question and the variables included in it, three analytical criteria were then outlined in order to identify a suitable theoretical framework. Firstly, the theoretical framework should be actor-centric to account for the role of the Commission as an actor pushing its interests forward. Secondly, it should take into account the role of the Member States as actors also seeking to push their interests forward. Finally, a theoretical framework should also account for the relation between these actors.

In light of the aforementioned criteria, the PAM was identified as the most suitable theoretical framework for this research. Section 2.3. offered a review of the main assumptions of the model and the hypotheses developed in the literature so far. The section focused on the concepts of delegation and functions to be delegated, *interests* and *preferences*, agency losses, control mechanisms, discretion and agency behaviour. The review of the model suggested that PA can be particularly useful in addressing the research of this thesis for three reasons. Firstly, it looks at the Commission as the agent of the Member States to which specific tasks have been delegated. PA literature also

argues that the Commission has its own interests and preferences and will try to pursue them. Secondly, the model accounts for the role of Member States as principals that, acting as rational actors, delegate functions to the Commission in order to reduce transaction costs; the Member States also control the Commission, making sure that its actions do not go against their preferences and interests. Finally, the model allows investigation of the relations between the Commission and the Member States and the dynamics of conflict and cooperation that may occur.

The chapter has also shown that the choice of the PAM as theoretical framework was not conceived in a vacuum. Based on the three criteria mentioned earlier, other theoretical approaches were reviewed in section 2.4. Firstly, *Neofunctionalism* and the *Rational Choice Institutionalisms* were reviewed as actor-centric theories that – looking at the institutions as actors – may speak to the PAM for the purposes of the research. The review suggested that, although useful in explaining the role of the Commission, *Neofunctionalism* tell us little about the role of Member States, important actors in this research. *Rational Choice Institutionalisms*, from which the PAM stems, instead, seems more useful in addressing the research question of this thesis. Secondly, *Intergovernmentalism* and its variant *Liberal Intergovernmentalism* were reviewed as theories which focus on the role of national governments in the process of European integration. Although useful in accounting for Member States pushing their own preferences at European level, these theories do not aim to provide an account of the inter-institutional relation between the Commission and the Member States and, for this reason, fall short in meeting two of the criteria outlined for consideration. Finally, *Multi-Level Governance* (MLG) was reviewed as a theoretical approach able to take into account the multiple levels of government: subnational, national, and supranational. Despite this theoretical approach that has also made use of the principal-agent model of delegations, several limitations in the way of looking at the subnational level do not make this approach the most suitable for this research.

In light of the review of the PAM and other theoretical approaches deemed appropriate for addressing the research question therefore, the former is adopted as theoretical framework for this research. The model seems to account for the role of the Commission, the role of the Member States and the relations that occur among them.

In the next section, the model is translated into a concrete research design where the main concepts are operationalised into measurable variables.

Chapter 3 Research Design
Identifying preferences and their effect on the Commission's behaviour

3.1. Introduction

In this chapter, the theoretical model outlined earlier in this thesis (Chapter 2) is operationalised in a concrete research design. The chapter begins by introducing the purpose of the research question: *under what conditions does the European Commission deviate from Member States' preferences in the external dimension of the EU internal energy market?* (3.2.). The chapter then continues by looking at the dependent variable of this work: the *Commission's deviation from Member States preferences* (DV), and how it is conceptualised and operationalised (3.3.). As outlined earlier, and building on PA literature, this research seeks to contribute to the knowledge of the concept of agent behaviour vis-à-vis their principals. This chapter therefore operationalises *the Commission's deviation from Member States' preferences* in terms of "deviation", "compliance" or "responsive autonomy".

A further section turns to the factors deemed likely to affect the Commission in its deviation from Member States' *preferences* (3.4.). It looks at two independent variables: the *preferences alignment among the principals* (IV1) and *preferences alignment between the principals and the agent* (IV2). In operationalising the independent variables, the section recalls the distinction between *preferences* and *interests* illustrated more in depth in the theoretical framework (2.3.2.) and its importance for this research. *Interests* are operationalised as given based on existing literature (see section 2.3.2.). As a result of this, the thesis focuses on the variety of *preferences* which will be operationalised on a case-by-case basis, relying on a wide range of sources.

Section 3.5. presents four testable hypotheses as to how the independent variables are likely to affect the dependent variable. The hypotheses are drawn from the PA literature which has, so far, offered various hypotheses about the conditions under which supranational organizations are able to pursue their distinct preferences, within the limits of their statutory discretion. Finally, a section on methodology and research methods introduces the qualitative case study method used in this thesis. The section presents the criteria for the selection of the cases and an overview of the cases selected. Finally, the methodological choices on data collection and data analysis are also presented (3.6.).

3.2. Research question and purposes

The purpose of this research is to explain the conditions – the independent variables (IVs) – that affect the Commission in deviating from Member States' *preferences* - the dependent variable (DV). The analysis is conducted in a specific policy area, *the external dimension of the EU internal energy market*, with the aim of deriving generalizable results about the effect of specific circumstances on the Commission's behaviour.

The *external dimension of the EU internal energy market* is defined by Herranz-Surrallés (2014) as one of three main dimensions of the EU external energy policy.[9] The *external dimension of the EU internal energy market* "includes the EU's activity aimed at the creation of a common energy regulatory space with third countries". The latter means to create a "liberalised and de-monopolised energy sector with producing, transit and consuming countries". Liberalisation and de-monopolisation are indeed deemed the best guarantee for the EU to deal with its energy dependency (Ibid). The same concept is conveyed in the European Commission's documents where it is stated that "creating a 'common regulatory space' around Europe, would imply progressively developing common trade, transit and environmental rules, market harmonisation and integration" (European Commission 2006b: 16). In turn, a common regulatory space

[9] Herranz-Surrallés (2014) identifies three dimensions of EU external energy policy: a) the external dimension of the internal energy market; b) energy security or foreign energy policy and c) the intersection between energy policy and other foreign policy aims.

is expected to create "a predictable and transparent market to stimulate investment and growth, as well as security of supply, for the EU and its neighbours" (Ibid).

This external dimension of the EU internal energy market, therefore, concerns the action of the EU with regard to promoting the rules of the internal energy market in third countries. This may include countries which produce energy or through which energy is transported (some of which might also be eligible for EU membership). Having third countries comply with the EU acquis on energy makes it easier for the EU to trade energy with those countries and thus to complete the internal EU energy market. Indeed, if third countries and their energy companies behave according to the EU acquis, there would be a common regulatory framework and the EU internal energy market would be strengthened. The following paragraphs will operationalise the external dimension of the EU internal energy market for the purpose of this research.

Operationalising the external dimension of the EU internal energy market

The Commission stressed the importance of "building up the external dimension of the EU internal energy market" in one of its most recent documents on energy policy and its external dimension (European Commission 2011b). According to the Commission, freedom and transparency of the energy markets are vital for the EU as the EU energy market itself depends on high levels of import (Ibid). Thus, "external energy policy needs to reflect the interconnectedness of the internal market and the interdependence of the EU Member States". According to the Commission, the external dimension of the EU internal energy market entails actions such as coordination in the internal market, diversification of supply sources and routes, an integrated energy market with all neighbouring countries and the convergence of the EU and Russian markets (Ibid). Some of those actions will be revisited in the coming chapters as the Commission's specific policy choices, or *preferences*. The external dimension of the EU internal energy policy therefore includes not only coordination within the internal energy market but also the creation of regulatory and legal convergence with neighbouring countries and Russia. This distinction will be revisited in the case selection section (3.6.1.).

Academic literature on EU energy policy also seems to confirm that the external dimension of the EU internal energy market includes both the internal energy market and the relations between non-EU countries. Prange-Gstöhl (2009, 5297), for instance, argues that "one of the main pillars of the EU's external energy policy is the objective of energy market integration […] with the EU's Eastern and South-Eastern neighbours and the 'neighbours of the neighbours', some of them being […] countries without any EU membership perspective." Other authors such as Belyi (2008) point out that when it comes to the external dimension of the energy policy, two aspects need to be taken into account. Firstly, the Commission's effort towards the liberalisation and integration of the internal energy market and secondly, the Commission's effort in "realising energy security and the internal market externally" (Ibid, 205). This latter aspect includes, in turn, the EU's commitment in exporting its model of energy markets to the outside world, and the EU's role in international organisations dealing with energy. Along the same lines, Baumann and Simmerl (2011) stress the interdependence of the internal and external dimension of the energy market.

To summarise this section therefore, academic literature on energy policy (Belyi 2008, Baumann and Simmerl 2011) and EU official documents (European Commission 2011) suggest that the *external dimension of the EU internal energy market* manifests itself in two main ways: a) coordination and integration of the internal energy market and b) measures contributing to the creation of a common regulatory area with third countries. In terms of specific outcomes, this translates into:

- Internal EU legislation concerning the internal energy market and its external dimension (i.e. Directives and Decisions);
- Initiatives aiming at the creation of an integrated energy market with third countries (i.e. Energy Community Treaty, Energy Charter Treaty)

This thesis will come back to this twofold manifestation of the *external dimension of the EU internal energy market* in the case study section (3.6.1.) where two cases regarding internal EU legislation and two cases regarding relations with third countries will be discussed.

Why look at the external dimension of the EU internal energy market?

Having operationalised the external dimension of the EU internal energy market, this subsection will turn to justifying why investigating the *external dimension of the EU internal energy market* is important for generating generalizable insights. This research argues that analysing the *external dimension of the EU internal energy market* helps to shed light on the dynamics of the inter-institutional relationships between the Commission and the Member States.

The *external dimension of the EU internal energy market* seems to reflect some of the main assumptions of the PAM. Firstly, PA assumes that principals and agent have different interests. The literature often argues that the Commission is deemed to have an interest in further integration (Pollack 2003). As will be explained in more detail later, literature on energy policy suggests that the Commission and the Member States have different interests. Secondly, PA also assumes that the agent will try to satisfy its own interest rather than those of the principals. Preliminary research has suggested that some conflict exists between the Commission and the Member States when it comes to the external dimension of energy policy. So far, however, the PA model has not been tested comprehensively on this policy area. Bocquillon and Dobbels (2013) looked at the climate and energy package (2007-2008), investigating whether a PA approach could explain patterns of interactions between the Commission and the European Council in a legislative agenda-setting in high profile cases. Proposing some provisional conclusions, they suggest that the relationship between these two actors in the specific case analysed is one of "competitive co-operation" (a phrase coined by Smith (1998)) where tension and competition emerge, but cooperation seems to prevail. Taking the relationship between the Commission and the Member States seriously, this thesis looks at the *external dimension of the EU internal energy market* as a new policy area in which the explanatory power of the PA model can be tested in a more comprehensive way. Thus, consideration of the *external dimension of the EU internal energy market* also enables the development of general conclusions about the Commission's behaviour and the conditions under which the Commission deviates from Member States' *preferences*. In doing so, this research seeks to contribute to the broader PA literature as well.

In summary therefore, this thesis seeks to explain *under what conditions the European Commission tries to deviate from Member States' preferences in the external dimension of the EU internal energy market*. By investigating the external dimension of the EU internal energy market, which has not been covered comprehensively by PA literature so far, this research aims to contribute to the explanation of the Commission's deviation from Member States' *preferences*. The next section will turn to the Commission's deviation from Member States' *preferences* as the dependent variable of this research.

3.3. Defining the dependent variable (DV): the Commission's deviation from Member States' preferences

In this section, the concept of the agent's behaviour will be operationalised as the dependent variable of this research: the *Commission's deviation from Member States' preferences* (DV). Operationalising the dependent variable in this way enables investigation of its variation and of the independent variables determining that variation. PA literature (Delreux 2011; Pollack 2003; Hawkins et al. 2006) has sought to explain agency behaviour in terms of discretion and autonomy of the agent vis-à-vis its principals, starting with the assumption that "delegation […] entails side effects that are known […] as agency losses" (Kiewiet and McCubbins 1991). The literature refers to side effects of delegation using several terms - *agency slack*, *political* and *bureaucratic drift*, *shirking* and *slippage* – providing often only general definitions of these concepts (Dür and Elsig 2011; Delreux 2011; Elsig 2007; Franchino 2001).

Hence, the aim of this thesis is to contribute to the understanding of the agent behaviour vis-à-vis its principals, operationalised as *deviation from principal's preferences*. Can the agent's behaviour merely be categorized as *shirking*/*slippage* – for which a clear distinction still has to be defined - or can a more precise categorization of the possible agent's behaviours be offered? Such an endeavour needs to begin with a consideration of the responsibilities and powers of the Commission. In a context that does not focus on the PA literature specifically Nugent (2010) groups "the responsibilities and associated powers of the Commission" under six major headings : (1) Proposer and developer of policies and legislation; (2) Executive

functions, (3) Guardian of the legal framework, (4) External representative and negotiator, (5) Mediator and conciliator, (6) Promoter of the general interest. This thesis will focus on points 1) proposer and developer of polices and legislation and 4) external representative and negotiator. More detailed information is included in box 3.1 below.

Box 3.1: Responsibilities and powers of the Commission based on Nugent 2010

1) Proposer and developer of policies and legislation

- Policy initiation and development;
- Legislative initiation and development;
- Advisory committee networks;
- Expert committees;
- Consultative committees
- Hybrid committees

4) External representative and negotiator

- Determining and conducting the EU's external trade relations;
- Negotiating and managing responsibilities in respect of the various special external agreements that the EU has with many countries and groups of countries;
- Key point of contact between the EU and non-member states;
- Responsibilities for applications for EU membership.

Nugent's (2010) classification is very thorough but tells little about the role of the Commission as agent of the Member States and its deviation from Member States' *preferences*. PA literature however, identifies some "key functions or powers" (Pollack 2003) of the agent: a) monitoring individual compliance with agreements between them, and providing information about compliance to all participants; b) solving problems of "incomplete contracting"; c) adoption of credible, expert regulation of economic activities in areas where the principals would be either ill-informed or biased; and d) powers of formal agenda-setting. Another good overview of the "functions of the agent" is offered in the passage below:

> "[agents] facilitate commitment problems, reduce information asymmetries, enhance the efficiency in coming to decisions, take the blame for unpopular decisions (Thatcher and Stone Sweet, 2002), carry out third-party conflict resolution, create policy bias (Hawkins et al., 2006), represent principals in negotiations with third parties (Meunier and

> Nicolaïdis, 1999) and implement policies (Pollack, 2006)" (Da Conceição 2010, 1113).

In looking at the "responsibilities", "powers" (Nugent 2010) or "functions" (Pollack 2003; Da Conceição 2010) exerted by the agent, this research looks at one particular aspect: the behaviour of the agent vis-à-vis its principals. Indeed, the agent can exert its function through satisfying Member States' *preferences* or deviating from them. Depending on their behaviour vis-à-vis their principals, agents can be seen as "merely servants of the Member States" (Moravcsik 1993), trustees (Majone 2001), own actors (Da Conceição 2010; Pollack 2006) or something in between (Baldwin 2006; Elsig 2007) (in Da Conceição (2010, 1113). Hence, building on PA literature, this research defines *deviation* as any behaviour that differs or departs from Member States' *preferences,* and operationalises deviation as follows:

Full compliance (absence of deviation)

The Commission behaves as "merely [a] servant of the Member States" (Moravcsik 1993); simply performing the "responsibilities and related powers" (Nugent 2010) or agents' "function" (Pollack 2003). This case can be described as absence of deviation. When the Commission behaves as a faithful agent, no conflict situation is expected to arise between the Commission and the Member States.

Responsive autonomy

The Commission behaves somewhere between full compliance and full deviation when it tries to take advantage of its autonomy or discretion but is still responsive to Member States' demands. Writing about negotiations in trade policy, Baldwin (2006, 930) depicts the Commission as "in the driving seat, but forced to be responsive to Member State demands". In a similar manner, writing about the choice of regulatory venues for trade negotiations Elsig (2007, 944) argues that the Commission has "substantial autonomy to act" as is allowed by "existing delegation design (e.g. agenda setting power), high thresholds for Member States to sanction the Commission, and the multi-level system" (Ibid: 928). For the purpose of this thesis, when the Commission tries to take advantage of its autonomy or discretion but is still responsive to the *preferences* of the Member States, its behaviour is categorized as "responsive

autonomy," as the Commission does not behave as "merely [a] servant of the Member States" neither does it behave as an "own actor".

Deviation

The Commission behaves as an "own actor" (Eugénia Da Conceição-Heldt 2006; Pollack 2003) acting opportunistically and pursuing its own *interest* and *preferences* rather than those of the principals. When the Commission behaves as an "own actor" it triggers an opposition from the Member States and this state of affairs might lead to conflict situations (Da Conceição 2010). A situation of conflict is characterised by the opposition of the Member States vis-à-vis the Commission and by the attempt of both actors to pursue their divergent preferences.

Proposing the categorization of the agent behaviour as illustrated above then, this thesis distinguishes itself from the PA literature which simply accounts for deviation or lack of deviation using terms such as agency losses, shirking and slippage, bureaucratic and political drift. Moreover, a clear distinction between shirking and slippage is hard to be proven empirically (Kerremans 2006). The contribution of the categorization offered in this thesis, therefore, is that it moves from the mere distinction between deviation/not deviation used in PA literature and allows for some behaviours in between these two extreme behaviour. The main difference with existing literature consists in the distinction between interests and preferences. In the new categorization proposed in this thesis, therefore, the terms "deviation" indicates a situation in which the agent behaves as own actor pursuing its own preferences and interests. This situation is different from "responsive autonomy" in which the agent pursue its own interest but is still responsive to Member States' demands or preferences.

This categorization of deviation drawn from the PA literature will be revisited in the conclusion of this thesis in light of the analysis conducted in the empirical chapters. The analysis of concrete case studies is expected to contribute to the understanding of the Commission's behaviour vis-à-vis its principals and provide some empirical evidence of the Commission's deviation from Member States' *preferences*. Empirical data is expected then to contribute to the theoretical debate about agency behaviour

which, so far, has been limited to *shirking* and *slippage*. The next section will turn to the operationalisation of the conditions – the independent variables – expected to affect the Commission's deviation from member States' *preferences*: the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2).

3.4. Defining the independent variables (IVs): the role of preferences and interests

What affects the *Commission in its deviation from Member States' preferences in the external dimension of the EU Internal Energy Market*? Or, to put it differently, which are the conditions that make the dependent variable change? This section describes the independent variables that condition the Commission's deviation from Member States' *preferences*. As for the dependent variable, the independent variables are also derived from the literature on PA and can be operationalised as follows:

- *Preference* alignment among the principals (IV1);
- *Preference* alignment between the principals and the agent (IV2).

Each independent variable can take two values. When the preferences are similar, they are defined as *homogeneous*; when different, they are defined as *heterogeneous*. As illustrated in the theoretical framework of this thesis (2.3.2.), *preferences* are a key concept in this research. It is worth remembering some important aspects of that section here. This research follows Milner's (1997) distinction between *interests* and *preferences*. *Interests* are defined as "fundamental goals which change little". In particular, "actors are assumed to have certain fundamental *interests*, captured by their utility functions, which they attempt to maximize" (Ibid, 33). *Preferences*, on the other hand, refer to the "specific policy choice" that actors believe will maximize their *interests*. *Preferences*, therefore, derive from basic *interests* (Ibid 15; 22). The distinction between *preferences* and *interests* is important as it allows a comprehensive picture to be drawn about what drives the actors involved, in this case, the Commission and the Member States.

How then will the *interests* and the *preferences* of the Commission and those of the Member States operationalised? Using Milner's (1997) distinction, *interests* are taken

as given and deduced from existing literature. *Preferences*, on the other hand, cannot be operationalised once and for all and therefore will be defined on a case-by-case basis with regard to a particular "initiative"- or case study for the purpose of this thesis. Preferences will be inferred inductively from a wide range of sources, as it is typical in qualitative research.

Identifying the *interest* of the Commission and of the Member States

As far as *interests* are concerned, this research takes the simplifying assumption that the Commission has an *interest* for competence maximization while the Member States have an *interest* for control over energy policy. In this subsection these assumptions are explored using PA literature and energy policy literature.

There seems to be broad agreement in the PA literature that the Commission has an *interest* for competence maximization (Tallberg 2002; Ellinas and Suleiman 2012; Schafer 2014; Hooghe 2002; Franchino 2007). This thesis, then, shares Pollack's argument that the Commission is a "unitary, rational, competence-maximizer" actor (2003, 36). The Commission is seen as "a *preference* outlier with a strong preference[10] for further integration, and can be expected to use its powers to pursue those aims" (Ibid). As stressed by Pollack, there are several reasons why the Commission might have an interest for competence-maximization: "self-selection for integrationist personnel in European organisations (Bonham 1978); socialization of personnel once they arrive at the organization (Mancini 1991); or simply bureaucratic politics (Peters 1992)" (quoted in Pollack 2003, 35-36). This research, however, does not focus on the reasons for the interest of the Commission. Rather, it shares the simplifying assumption of the Commission as unitary, rational, competence-maximizer actor with an interest for further integration (see also 2.3.2).[11] Taking interests as given, allows focusing on the variety of preferences or "policy choices" as defined by Milner (1997). As acknowledged by Pollack himself however, this simplification is problematic

[10] Pollack (2003) and Milner (1997) use the word "preference" in different ways and this might lead to confusion. Pollack (2003, 85-6) uses the word "preference" to indicate "aims" rather than "policy choices" which is used by Milner (1997).

[11] There is debate in PA literature about the assumption of the Commission as competence- maximizer. See, inter alia, Norman 2015; Randour, Janssens, and Delreux 2014; Dijkstra 2013 who argue that the aforementioned assumption can be misleading.

because the Commission is composed of several sub-units with distinct policy preferences. Taking the simplifying assumption above is thus useful in order to focus on the behaviour of the Commission vis-à-vis the Member States. For the purpose of the analysis therefore, the Commission is depicted as unitary actor with an interest for further integration.

Literature on energy policy also seems to suggest that the Commission has been trying to expand its competence in this policy area. Scholars argue that the European Commission is playing an "active role" in the external dimension of energy policy (McGowan 2008; Mayer 2008) "constantly speeding up its output […] in order to push the project of a common energy policy forward" (Baumann and Simmerl 2011). Other authors have stressed how the Commission is also trying to expand its competence in the external dimension of EU energy policy by extending internal energy market principles in neighbouring countries (Prange-Gstöhl 2009; Riley 2012). The assumption of the Commission as unitary actor has also been put forward in energy policy literature. Despite comprising several DGs, the Commission (notably DG Energy), it has been argued, can be considered as a single agent because when the Commission relates to other actors such as the Parliament or Member States, it is expected to assume a common and coherent position. In other words, "internal differences between directorates have to be resolved before a proposal can be sent on to the Parliament" (Matlary 1997, 107).

As far as the *interest* of the Member States is concerned, this research starts from the PA assumption that principals delegate power to supranational institutions to reduce transaction costs, which can be informational or of credible commitment (Pollack 2003). Principals, however, do not aim to lose control over the policy area in which they are delegating some tasks or power. As illustrated in more detail in chapter 2, principals use a variety of control mechanisms to make sure that the agent perform the tasks delegated. Illustrating the interest of political actors, Milner (1997: 34) argues that their fundamental goal is to maximize their utility, "which is assumed above all to depend on re-election". Although acknowledging that "re-election is not the only goal attributed to political actors", for the sake of simplification, Milner assumes that "staying in office is 'the fundamental goal' of political actors.

Applying Milner's rationale to this thesis requires two main clarifications. Firstly, this research argues that Member States are represented in the European Council and in the Council of Ministers as "political actors" or "executive" (Milner 1997). As far as the EU is concerned, Member States are represented by Heads of State or Government of the Member States in the European Council and Ministers in the Council of Ministers. More specifically this research looks at the Council of Ministers in its configuration of Transport, Telecommunications and Energy Council (TTE), members of which are Energy Ministers. As far as Energy Ministers in the Council are concerned, rules for their appointment may vary across Member States but it seems safe to argue that they are expression of the government in power in their own country (Bomberg, Peterson, and Corbett 2011).

Secondly, in this research, it is assumed that the *interest* of the Member States can be operationalized as maintaining control over energy policy. Literature on energy policy seems to suggest that national governments have always guarded their national energy policy jealously (Padgett 1992; Belyi 2008). Energy has normally been located in the sphere of high-priority national politics (Braun 2009, 430; Eikeland 2011, 245), interpreted in terms of national security (Kirchner and Berk 2010, 868) and sovereignty (Baumann and Simmerl 2011; McGowan 2008). For this reason, Member States are intent on "maintaining national control over energy resources and national preferences as a matter of national policy" (Andoura, Hancher, and Van Der Woude 2011, IV–V). For the purposes of this research then, Milner's *interest* for re-election is translated into control over energy policy.

To conclude this reflection on the definition of the *interests*, this subsection has argued that sharing the Rational Choice assumption that *interests* are given, the Commission is assumed to have an *interest* for competence-maximisation and the Member States are assumed to have an *interest* for control over energy policy. This definition of interests satisfies one of the main assumptions of the PAM: that the principal and the agent have different *interests*. Taking these interests as given therefore enables the discussion to move to *preferences*, the main focus of this research.

Identifying the *preferences* of the Commission and of the Member States

Having deduced *interests*, or fundamental goals, from existing literature, this research will now turn to *preferences*. *Preferences* can be defined as "specific policy choice[s]" that actors believe will maximize their *interests* (Milner 1997, 15). As for *interests*, *preferences* are "notoriously difficult to measure" (Häge and Toshkov 2011). On a similar note, Hooghe (2002, 10) has argued that "*preferences* pose a serious research challenge to social scientists" as they "cannot be observed objectively, unless one engages in in-depth structured interviewing". For the purpose of this research therefore, *preferences* are inferred from a wide range of sources including documents produced by EU institutions, journalistic reports, quantitative data issued by major energy companies, agencies or NGOs and interviews (see section 3.6.2. on Data Collection).

The Commission's *preferences* are assumed to serve the fundamental *interest* of competence-maximization. As *preferences* are "specific policy choices" they cannot be operationalised once and for all. *Preferences* are operationalised with regard to a particular initiative on energy policy. For this reason, the Commission's *preferences* will be analysed in detail in the empirical chapters of this thesis. To provide general guidance at this stage however, some *preferences* can be derived from the fundamental goal of competence-maximization: coordination of the internal energy market; diversification of supply sources and routes, an integrated energy market with all countries of its neighbourhood, convergence of the EU and the Russian energy markets (European Commission 2011b). These general guidelines will be tested in the empirical chapters where the preferences will be operationalised for each case study.

As far as Member States' *preferences* are concerned, the same conditions stated for the Commission applies. Member States' *preferences* are supposed to serve the *interest* of maintaining control over energy policy. When it comes to the *external dimension of the EU internal energy market*, this *interest* is served by policy choices – *preferences* – such as strengthening energy security, protecting bilateral contracts with third countries' energy suppliers, expanding the energy market beyond EU borders and so

forth (Buchan 2010a). Member States' *preferences* will also be analysed in more detail in the empirical chapters of this thesis, as outlined above for the Commission.

3.4.1. *Preference* alignment among the principals (IV1)

This thesis argues that the *preference* alignment among the Member States can affect the Commission's deviation from Member States' *preferences* (DV) in the *external dimension of the EU internal energy market*. PA scholars use several expressions to operationalise the *preference* alignment among the Member States. Delreux (2011, 55) for example, writes about "preference homogeneity among the principals" while Da Conceição (2010) uses the term "degree of interest alignment among Member States." Elsig (2007, 931) also writes about the "interest constellation among the principals."

Regardless of these distinctions in the terminology, there is broad agreement in the PA literature that the preferences of the principals can affect the agent's behaviour. More precisely, when principals share preferences, the agent's discretion is expected to decrease (Pollack 2003; Hawkins et al. 2006; as quoted in Delreux (2011, 54).[12] The literature argues that when the discretion of the agent decreases, its deviation from Member States' preferences may also be expected to decrease as the agent has less opportunity to pursue their own preferences. By contrast, when principals have different preferences, the agent can "operate creatively" and "act autonomously" (Pollack 1997). The Commission can exploit the fact that Member States have different preferences "to shirk within certain limits, exploiting cleavages among the Member States to avoid sanctions, Council overruling of decisions, or alteration of the agent's mandate" (Ibid). Moreover, having agenda-setting powers, the Commission may also "push through those proposals closest to its own preferred policy that can also garner a qualified majority in the Council" (Ibid.). The PA literature therefore seems to suggest that whether principals have the same or different *preferences* is a potential explanatory factor for the agent's behaviour.

[12] In PA literature, "discretion is a dimension of the contract between a principal and an agent" (Hawkins et al. 2006) and is not to be confused with autonomy: "where discretion gives the agent leeway the principal deems necessary to accomplish the delegated task, autonomy is the range of independent action available to the agent" (Ibid). See also, inter alia, Pollack 2003; Niemann and Huigens 2011. These terms are however often used interchangeably. See also Chapter 2 of this thesis.

Operationalising the *preferences* of the principals is particularly difficult for at least two reasons. Firstly, the number of Member States (i.e. principals) has changed over time, from 6 Member States in 1951 to 28 Member States in 2013. Taking into account the *preferences* of a wide and increasing number of actors is particularly challenging. Secondly, in both the EU institutions where the principals are supposed to express their *preferences,* the Council of Ministers and the European Council, the vote is secret. Thus, consensus is used in the energy Working Group within the Council of Ministers. Inevitably then, a problem of indicators arises when it comes to operationalising *preferences*. For this reason, when available, this research will make the best use of the Conclusions of the European Council and the Note of the Presidency of the Council of Ministers to obtain as much information as possible.

Moreover, to overcome these challenges, this thesis will use a wide range of sources such as documents produced by EU institutions, journalistic reports, quantitative data issued by major energy companies, agencies or NGOs and interviews (see section 3.6.2. on Data Collection). Using a wide range of sources allows collecting a large amount of data and, consequently, confidence in inferring *preferences* from the data. The wider the range of sources, the better will be the reconstruction of the variety of *preferences* that exist across the actors and across the case studies. This point will also be revisited in the data collection section of this chapter (3.6.2.).

As outlined above therefore, for the purpose of this thesis, *preferences* will be identified by conducting a careful and detailed qualitative analysis of the wide range of sources mentioned above, and then operationalised as either heterogeneous or homogenous. When data provides information about specific *preferences* of individual Member States on a particular initiative and those *preferences* are different across Member States, *preferences* among the Member States have to be operationalised as *heterogeneous*. *Preferences* also have to be operationalised as *heterogeneous* when data highlights the existence of some tension within the Council of Ministers or the European Council or amongst Member States in general on a particular file. *Preference* heterogeneity may be indicated by terms such as “different opinions” or “rival factions”.

By contrast, *preferences* have to be operationalised as *homogenous* when data does not suggest any relevant differences across the Member States in terms of *preferences*. *Preferences* homogeneity may be inferred from terms such as "Coreper[13] reached agreement on" or "the majority of Member States". It has to be borne in mind, however, that the term majority as used for example in the Notes of the Presidency of the Council of Ministers, is not a formal indication of vote. These kinds of terms are therefore interpreted as homogeneity of *preferences* among the Member States but should not be read as a formal indication of vote strict sense. The importance of relying on several sources then is apparent: EU official documents may be more or less explicit about the existence of *preference* homogeneity or heterogeneity among the Member States. Other sources, such as Member States' official documents, press releases and reports need to be taken into account as to explore *preferences*. Finally, interview data may also contribute to identifying the *preferences* that exist among the Member States.

To sum up, whenever data suggests the existence of different *preferences* that prevented the Council from adopting a common position or reaching an agreement, *preferences* among the Member States will be operationalised as *heterogeneous*.

3.4.2. *Preference* alignment between the principals and the agent (IV2)

The second independent variable is meant to compare the *preferences* of the agent with those of the principals. PA literature assumes that principals and agents have different *preferences* or *interests* and that, as a consequence, every delegation entails some side-effects known as agency losses (Pollack 2003). This thesis, however, argues that there is a difference between *preferences* and *interests*, and that principals and agent may share some *preferences* even when keeping different *interests*. The *preferences* between the principals and the agent therefore can be homogenous or heterogeneous. Based on this assumption, the *preference* alignment between the principals and the agent is also a potential explanatory factor of the agent's behaviour.

[13] Coreper stands for the 'Committee of the Permanent Representatives of the Governments of the Member States to the European Union'. It is the Council's main preparatory body which examines all items to be included into the Council's agenda.

As effectively presented by Da Conceição (2010, 1110) "in a classical delegation situation, the agent might have preferences that are systematically different from those of the principals, which might lead to conflict situations between principals and agents". On the other hand, the agent and the principals, or some of the principals, might also share preferences (Delreux 2011) i.e. agreement on a specific policy choice.

P*reference* alignment between principals and agent is measured by comparing the perceived agent's *preference* to those of the principals (Delreux 2011: 55). When the principals and the agent do not share the same *preferences*, *preferences* have to be operationalised as *heterogeneous*. As the first independent variable, the operationalisation of the second independent variable needs to be built upon a wide range of sources so as to rely on as much information as possible in detecting the *preferences* of the main actors. Heterogeneity of *preferences* can be inferred from the sources when terms such as "opposition", "resistance", and "reluctance" are used to describe the attitude of Member States towards the Commission's proposals. By contrast, when none of the sources available provide any evidence about a tension existing between the Commission and the Member States, then *preferences* are operationalised as *homogenous*. These indicators will be revised in the conclusion of this thesis.

Comparing the perceived agent's *preference* to those of the principals can be particularly difficult in a situation characterized by heterogeneous *preferences* among the principals (Delreux 2011: 55). Delreux uses the pivotal player *preference* within the collective principal as a benchmark for "the *preference* of the principals" in order to compare them to those of the agent. If the *preferences* of the agent fall within the majority group of the Member States' *preferences*, they are considered homogenous with those of the principals. By contrast, if the *preferences* of the agent fall outside the scope of the majority of the Member States, they are considered heterogeneous with those of the principals. As a result, Delreux argues, "the *preference* of outlier principals are not taken into account when the degree of *preference* homogeneity between agent and principals is determined" (Ibid).

Sometimes, however, applying this system in a strict way could be misleading or not even possible. It could be misleading as, at times, it is indeed the *preferences* of the outlier that establish the character of the relationship between the Commission and the Member States, as the former could try to align with a small group of Member States to push its own *preferences* further. Secondly, it is not always possible to understand whether *preferences* fall inside or outside the scope of the majority of the Member States as data about the *preferences* of each of the 28 Member States is not always available. How then is the second independent variable operationalised when Member States have heterogeneous *preferences*?

This research will use an analytical device to compare the heterogeneous *preferences* of the principals with those of the agent. When the *preferences* among the principals are heterogeneous, *a small subset of Member States sharing homogenous preferences* will be identified. The small subset will be identified through preliminary research which reveals which Member States are the most relevant and active in a particular case. The use of *an empirically informed small subset of active Member States with homogenous preferences* will overcome the analytical limitation of relying on a simple majority benchmark. This will be tested in the data chapters, and its value as an analytical device will be revisited in the conclusion of this work, particularly when outlining the contribution to PA literature. Member States are to be defined as "active" when they are particularly involved in an initiative in the field of energy or are particularly vocal about their preferences and try to push these preferences further. This point will also be revisited in the conclusion of this thesis.

To summarise this section therefore, two independent variables – the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) are assumed to affect the Commission's deviation from Member States' *preferences* (DV). In both cases, the role of *preferences* is key. Given that *preferences* are specific policy choices they will be identified on a case-by-case basis in the empirical chapters of this thesis. In the next section, four hypotheses are formulated to test the effect of the independent variables on the dependent variable.

3.5. Hypotheses

The previous section has illustrated the independent variables – the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) – which are deemed potentially helpful in explaining the Commission's deviation from Member States' *preferences* (DV). This section now turns to presenting four hypotheses intended for testing the effect of each independent variable on the dependent variable. The hypotheses stem from the literature on delegation and post-delegation dynamics in the European Union (Pollack 2003).

PA has offered several testable hypotheses about delegation of power to supranational institutions. In what is so far probably the most comprehensive work on delegation and agency behaviour in the EU, Pollack (2003) offers two sets of hypotheses. The first set of hypotheses looks at the specific functions delegated to an agent and the conditions under which Member State principals delegate greater or lesser discretion to their agents. The second set focuses on the conditions under which supranational institutions such as the Commission are able to "pursue their distinct preferences, within the limits of their statutory discretion" (Ibid, 19).

This research fits into the second group of hypotheses as it investigates the Commission's ability to pursue their own *preferences* in the external dimension of the EU internal energy market. This thesis aims to test whether the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) affect the probabilities of deviation of the agent from the preferences of the principals. That is to say that, depending on the different values of the independent variables (homogenous or heterogeneous), this research expects different probabilities of deviation or other possible agent's behaviour, in particular deviation, responsive autonomy or full compliance. This work therefore falls in line with the PA literature that looks at the probabilistic character of the action of the agent and the principals (Delreux et al. 2012; Delreux and Kerremans 2010). Table 3.1 at the end of this section, offers a visual representation of the four different hypotheses stemming from the different possible values of the independent variables. The table also offers the expected outcomes for each hypothesis. This table will be revisited and completed in the conclusion, in light of the results and findings of the case studies.

Hypothesis 1 (H1):

When the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals.

The PA literature argues that "when principals share preferences, the agent's discretion is expected to decrease" (Pollack 2003; Hawkins et al. 2006; Delreux 2011). Following this rationale, this thesis suggests that when its discretion decreases, the agent is less likely to try to deviate from the *preferences* of the principals. Deviation would be hazardous for at least two reasons.

Firstly, Member States sharing the same *preferences* would be able to better control the agent as they would make effective use of control instruments. Control mechanisms are costly to the principals. If Member States share the same *preferences* it is likely that they would work together to control the agent making the use of control mechanisms effective.[14]

Secondly, Member States sharing the same *preferences* would be able to find the necessary agreement to apply some sort of *ex-post* sanction to the agent such as cutting the agency's budget, dismissing or reappointing agency personnel, adopting new legislation that overrules a Commission decision through Council legislation, and unilaterally refusing to comply with an agency decision (Pollack 1997). For these reasons, the homogeneity of *preferences* among the Member States is therefore expected to reduce the probability of deviation.

Other possible types of agent behaviour are more likely to occur, i.e. responsive autonomy and full compliance. The agent might try to take advantage of its autonomy or discretion but be still responsive to principals' demands (responsive autonomy). Another likely scenario would be full compliance, where the agent behaves performs its tasks without deviating from the preferences of the principals (see section 3.3.).

[14] As mentioned in section 2.3.4. of this thesis Member States can control the agent *ex ante* – through administrative procedures defining the scope, the legal instruments available and the procedure to be followed by the agent during the agency activity –, *ex post* - monitoring agency behaviour – and *ad locum* when the Commission negotiates at the international level

Hypothesis 2 (H2):

When the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals.

By contrast, the Commission might exploit the situation when Member States have heterogeneous *preferences* to deviate from Member States' *preferences*. As effectively put by Pollack (1997: 129), the Commission can exploit such a situation "to shirk within certain limits, exploiting cleavages among the member states to avoid sanctions, Council overruling of decisions, or alteration of the agent's mandate". Moreover, having agenda-setting powers, the Commission may also "push through those proposals closest to its own preferred policy that also can garner a qualified majority in the Council" (Ibid).

This thesis suggests that when the Commission behaves as described above, it tries to satisfy its own *preferences* rather than those of the Member States and therefore deviates from Member States' *preferences*. This kind of scenario might occur because when the Member States have different *preferences,* the use of control mechanisms and sanctions is more costly and more complicated. As argued previously in this section, sanctions require agreement among the Member States before they can be put in place. The same can be argued for control mechanisms, as the latter require also some sort of cooperation among the Member States before they can be implemented.

The heterogeneity of *preferences* among the Member States therefore is expected to increase the probability of deviation. As mentioned earlier in this chapter (3.3.), in this kind of situation, the agent is more likely to behave opportunistically and in doing so, to create a conflict situation with the principals.

Hypothesis 3 (H3):

When the preferences between the principals and the agent are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals.

The PA literature also suggests that "in a classical delegation situation, the agent might have preferences that are systematically different from those of the principals, which might lead to conflict situations between principals and agents" (Da Conceição 2010,

1110). In other words, when the Commission and the Member States have different *preferences*, the former is expected to satisfy its own preferences rather than those of the principals (Pollack 2003) generating a conflict with the Member States.

This hypothesis therefore suggests that when the *preferences* between the agent and the principals are heterogeneous, it is likely that the Commission would try to pursue policy choices that serve its fundamental goal of competence-maximization and deviating from the *preferences* of the Member States. As a consequence, a situation of "conflict" or tension between the Commission and the Member States is likely to arise, as both actors would try to satisfy their own, divergent, preferences. Hypothesis 3, therefore, suggests a scenario of deviation as more likely than other agent behaviours, such as responsive autonomy and full compliance.

Hypothesis 4 (H4):

When the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals.

It may also be the case that the agent and the principals, or some of the principals, (even if they keep different *interests)* share homogeneous *preferences*. If this is the case, the Commission is less likely to deviate from the preference of the Member States. This is because the homogeneity of *preferences* between the principals and the agent might open the way for some scenario of cooperation in order to achieve common *preferences*.

The PA literature does not offer many testable hypotheses on cooperation between the agent and the principals, as it assumes that principals and agents always have different preferences. Looking at both *preferences* as policy choices and *interests* as fundamental goals, this research expects that, even if Member States have different *interests,* (as assumed by PA literature) they can share some similar *preferences*. In that case, the scenario of deviation is less likely to occur.

With regard to hypothesis 4 above, other outcomes, such as responsive autonomy and full compliance, are more likely to happen. Indeed, it is likely that the agent will try to pursue its own preferences and to be, at the same time, responsive to the demands of

the principals (responsive autonomy). It is also likely that the agent performs its tasks without deviating from the preferences of the principals (full compliance).

To summarise therefore, a model is offered that can test the explanatory power of the PAM in explaining under what conditions the Commission tries to deviate from Member States' preferences in the external dimension of the EU internal energy market. The preference alignment among the principals (IV1) and the preference alignment between the principals and the agent (IV2) are expected to potentially affect the probability of the Commission's deviation (DV). Four testable hypotheses have been formulated about the relation between the dependent variable and the independent variables of this research. These hypotheses will be tested in four empirical case study chapters. The next section turns to the qualitative case study method driving this research. The section will also outline the main methodological choices in data collection and data analysis.

Table 3.1: Hypotheses

Independent Variables	Values of the Independent Variable	Hypothesis tested	Possible outcomes		
			Full compliance	Responsive autonomy	Deviation
Preference alignment among the Principals (IV1)	Homogeneous	H1	**?**	**?**	✗
	Heterogeneous	H2	✗	✗	✓
Preference alignment between the Principals and the Agent (IV2)	Heterogeneous	H3	✗	✗	✓
	Homogeneous	H4	**?**	**?**	✗

3.6. Methodology and Research Methods

3.6.1. Qualitative case study method

A qualitative case study method seems most suitable for the purpose of this thesis because it allows investigation of the variety of *preferences* that are likely to drive the behaviour of the Member States and the Commission in the *external dimension of the*

EU internal energy market. Qualitative methods reflect diversity and allow the development of comprehensive insights into the actions of the actors involved in this research. Although quantitative methods and statistical analysis have also been applied in research based on the PAM (see for example Franchino 2001; 2007), qualitative research designs have been used more extensively in EU studies (e.g. Billiet 2009; Damro 2006; Damro 2007; Keleman 2002; Kostanyan 2014; Eugénia Da Conceição-Heldt 2006; Da Conceição 2010; Eugenia Da Conceição-Heldt 2011; Eugénia Da Conceição-Heldt 2011; Delreux 2011; Delreux and Kerremans 2010).

Although building on some statistical analysis carried out by Franchino (2001), Pollack (2003) warns against the use of quantitative methods, as a reliance on proxy indicators for statistical analysis might produce some proxy problems. Proxy indicators provide precise numbers for statistical analysis but can also lead scholars to measure something other than what they intended to measure. Franchino (2001), for instance, uses the word count as an indicator of informational intensity, while other studies of delegation employ the same measure as an indicator of discretion (Ibid). Qualitative methods on the other hand, do not provide precise numbers for statistical analysis and are more suitable to appreciate the variety of *preferences* of the actors involved and to provide a means to study the various shades of the agent's behaviour. For this reason, four case studies have been selected following the criteria illustrated in the next subsection.

Case selection

A case study is here defined as "an intensive study of a single unit for the purpose of understanding a larger class of (similar) units" (Gerring 2004, 342). For the purpose of this research, "units" are operationalised as "initiatives" of the Commission in the *external dimension of the EU internal energy market*. Initiatives are defined as "events taking place at the European level to help the European Union towards its […] energy […] goals" (Buchan 2011b). "Initiative" is therefore used here as a broad concept that allows the inclusion of several events, such as a legislative process leading to a Decision or a Directive, as well as the conclusion of a multilateral treaty in the field of energy policy.

Looking at four "initiatives" as case studies, this thesis aims at "understanding a larger class of (similar) units". More precisely, the intention of this research is to obtain some generalizable results about the *interests* and *preferences* of the European Commission and the Member States in the external dimension of the EU internal energy market. This thesis intends therefore to draw some general conclusion about the conditions under which the Commission deviates from the *preferences* of the Member States.

Cases have been selected according to their relevance to the research question (Burnham 2004). Qualitative sampling has been carried out with the aim of reflecting diversity (Kuzel, 1992; Mays and Pope, 1995 quoted in Barbour (2008) and providing as much potential for comparison as possible. More precisely, following exploratory research, three selection rules have been applied. Firstly, cases have been selected on the basis of the *involvement of the European Commission*. As the aim of this thesis is to understand under *what conditions the European Commission tries to deviates from Member States' preferences in the external dimension of the EU internal energy market*, cases have been selected where the Commission as an actor is involved. The involvement of the Commission in EU energy policy should not be taken for granted. As mentioned earlier in this thesis, the Commission has relied on legal bases stemming from policy areas such as competition or the internal market to act in the field of EU energy policy. Member States, on the other hand, have been determined "to sustain their independence in the sense of an own and national energy (supply) policy and to consider this area as part of their sovereignty" (Pielow and Lewendel 2012, 265). The latter means that, for instance, the Commission does not have any competence on the national energy mix of Member States, and is not expected to play any role on this area of energy policy. As such, energy policy is an area where the distribution of competence between the Commission and the Member States is not always clear-cut. For the purpose of this thesis therefore, only cases where the Commission may be expected to play a role are taken into account.

The second selection criterion builds on the aim to look at the *conditions that may affect the Commission in its ability to deviate from Member States' preferences*. Cases have therefore, been chosen where such conditions are expected to be in place. As stated earlier in this chapter, two conditions are expected to affect the Commission's

deviation from Member States' *preferences*: the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2). A review of, and preliminary research on, the literature on energy policy, and press dedicated to European affairs, suggested several cases for consideration. In these cases, the alignment of the *preferences* of the Member States and the homogeneity or heterogeneity of those *preferences* with those of the Commission, may have affected the behaviour of the Commission as an agent and, more precisely, its deviation from Member States *preferences*. The cases therefore, have been selected on the expected variation of the independent variables (King, Keohane, and Verba 1994).

Finally, a third selection criterion used is *the external dimension of the EU internal energy market*. As mentioned earlier in this chapter, the external dimension of energy policy is a broad field, which is difficult to define or operationalise. For the purpose of this thesis, the external dimension of the internal energy market is operationalised as "the EU's activity aimed at the creation of a common energy regulatory space with third countries" (Herranz-Surrallés 2014). More specifically, the external dimension of the internal energy market includes two aspects: a) internal EU legislation concerning the internal energy market and its external dimension; b) initiatives aiming at the creation of an integrated energy market with third countries (i.e. Energy Community Treaty, Energy Charter Treaty).

As far as internal legislation is concerned (a), only cases where relations between the Member States and third countries were concerned have been selected. Other pieces of legislation, such as legislation on biofuels or renewables, have not been selected as they are not likely to affect relations between the Member States and third countries. On the other hand, with regard to initiatives aiming at the creation of an integrated energy market with third countries (b), preliminary research has been conducted on the Treaties Office Database of the European Commission.[15] A search for "energy" as sub-activity returned 43 agreements. Among those 43 agreements, only treaties signed by the European Commission and third countries have been selected (the Energy

[15] The Database contains all the bilateral and multilateral international treaties or agreements concluded by the European Union (EU), the European Atomic Energy Community (EAEC) and the former European Communities (EC, EEC, ECSC);
(see http://ec.europa.eu/world/agreements/default.home.do)

Charter Treaty and the Energy Community Treaty).[16] This means that international agreements such as Memoranda of Understanding (MoU) and Cooperation Agreements (CA) with third countries have not been considered. The reason behind this choice is that multilateral treaties are binding and require greater commitment from EU Member States than MoUs and CAs.

The case-studies for this research have thus been selected according to three criteria: a) involvement of the European Commission, b) variation on the independent variables and c) external dimension of the EU internal energy market. The next subsection offers an overview of the four case studies selected for this research. At the end of the subsection, table 3.2 summarises which hypotheses are tested in each chapter.

Overview of the cases

Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy

Decision 994/2012 introduces a mechanism for the exchange of information among the Member States and between the Member States and the Commission as far as intergovernmental agreements (IGAs) signed between Member States and third countries are concerned. In the absence of a mechanism of information, the Commission and the Member States themselves are not fully aware of the number of IGAs signed, nor are they aware of their content. In this context, the European Council (2011) called for a "better coordination of EU and Member States' activities with a view to ensuring consistency and coherence in the EU's external relations". The Commission reacted to this request with a very ambitious proposal that triggered some strong reactions among Member States.

Directive 2009/73/EC concerning common rules for the internal market in natural gas

The Directive was proposed by the Commission in September 2007. For the purpose of this thesis, the most relevant aspect of the proposal is Ownership Unbundling (OU), which requires the separation of supply and production activities from network

[16]http://ec.europa.eu/world/agreements/searchByActivity.do?parent=8512&xmlname=751&actName=Energy&printAcrivity=

operation. The Commission's proposal was expected to have important consequences for the relations between Member States and non-EU countries. Thus, Member States had different *preferences* on unbundling, reflecting the different levels of liberalisation of their national gas markets. The Commission's *preference* for the liberalisation of the internal energy market has been apparent since its genesis. This case therefore allows investigation of the dynamics of the relationships between the Commission and the Member States in concluding the Directive in a scenario where different *preferences* are at stake.

The Energy Community Treaty (EnCT)

The Energy Community Treaty (EnCT) was signed by the European Community and nine Contracting Parties of South-East Europe in 2005 with the aim of extending EU internal energy policy to the other Contracting Parties on the grounds of a legally binding framework. One of the most important features of the EnCT is that the EU, including its Member States, is Party of the Treaty while Member States are not parties of the Treaty on their own. The case, therefore, allows consideration of the external representation of the EU in international organisations, and analysis of the behaviour of the Commission as an agent in an international organisation. The intention of the EnCT is to export existing EU legislation on energy to the nine Contracting Parties of South East-Europe. It can be expected, therefore, that Member States as well as the Commission would benefit from the achievement of the objectives of the EnCT, as both would gain from a common regulatory area with South-Eastern European countries.

The Energy Charter Treaty (ECT)

The Energy Charter Treaty (ECT) was signed by some fifty states and the European Community in 1994 to provide a multilateral framework for energy cooperation concerned with the promotion and protection of investment, trade and the transit of energy goods (Cameron 2002). The ECT is also a case of external representation in the energy sector. However, distinct from the Energy Community Treaty (EnCT), Member States take part in the Energy Charter Conference, the decision making and governing body established by the ECT. The Treaty is a sort of revolutionary instrument as it brought together energy consumers and energy producers. As far as

EU Member States are concerned, preliminary research suggests that they had different *preferences* when it comes to the ECT. Thus, similar to the EnCT, the ECT was also expected to create some sort of benefit for the Member States and for the Commission as well. Homogeneity of *preferences* between the principals and the agent is therefore expected for this case.

Table 3.2: Case studies, hypotheses and possible outcomes

Case study	Hypothesis tested	Possible outcomes		
		Full compliance	Responsive autonomy	Deviation
Case study 1	H1	**?**	**?**	✗
	H3	✗	✗	✓
Case study 2	H2	✗	✗	✓
	H3	✗	✗	✓
Case study 3	H1	**?**	**?**	✗
	H4	**?**	**?**	✗
Case study 4	H2	✗	✗	✓
	H4	**?**	**?**	✗

3.6.2. Data collection and data analysis

One of the main strengths of qualitative research is that it allows the exploration of a wide array of dimensions of the social world (Mason 2002). In assessing the conditions under which the Commission deviates from Member States' *preferences* in the *external dimension of the EU internal energy market*, the wide array of *preferences* of both the Commission and Member States needs to be taken into account. Hence, this research relies on a wide range of sources, primary and secondary, to reflect the variety of *preferences* of the actors involved in this study.

Primary sources used for this research include direct evidence of decision-making such as official documents produced by the actors studied in this research: the European Commission and the Member States. For the Member States, documents produced by

the European Council and the Council of the European Union are analysed together with documents produced by individual Member States. Official documents include Communications from the Commission to the Council, Conclusions of the European Council, Common positions of the Council, and Reports of the European Parliament.[17]

Since official documents do not always provide an accurate indication of actor's sincere *preferences*, and these sometimes go unrecorded or distorted by strategic considerations in the formulation of official negotiating positions (Moravcsik 1998) they will be supplemented through the use of interviews with key officials from EU's supranational organisations and member governments. Interviews are a rich source of behind-the-scene information about actor *preferences* and principal- agent interactions that are not captured on the official records (Ibid). Twenty-nine semi-structured expert interviews have been conducted in Brussels in June and July 2013 with three different kinds of interviewees (See Appendix I):

- Interviewees working within the Directorate General for Energy (DG ENERGY) ;
- Interviewees working within the Permanent Representation and the Council Secretariat;
- Other interviewees: European External Action Service (EEAS),[18] Think tanks, sector association, researchers.[19]

Interviewees were selected through purposive sampling and snowball/chain referral. Purposive sampling was used to identify the particular respondents of interest and the sample deemed most appropriate (Judd, Smith, and Kidder 1991). Snowballing allowed the identification of an initial set of relevant respondents, and then by asking for suggestions of other potential interviewees who might be relevant for the study, enabled an appropriate sample size for the purpose of this study.

In selecting the respondents, positional and reputational criteria were also applied. The former allows the identification of a set of positions of key elites which are the focus

[17] For the purpose of this thesis, the European Parliament is treated as a source of information.
[18] As for the European Parliament, the EEAS is also treated as a source of information in this thesis.
[19] Interviewees belonging to this subgroup are not cited in this thesis. Their insights, however, have been useful in enabling the author to get a good understanding of the broad picture of energy policy.

of the study; this was based on their areas of interest and on the political structures of relevance acquired in the previous phases of the data collection. In addition, the reputational criterion allowed selection of respondents according to the extent to which they were deemed influential in the political arena by their own peers. As expected, the snowball sampling method allowed the establishment of a list of people who are considered to be influential in energy policy. Indeed, this method was useful in identifying influential actors who might otherwise have been ignored, as elites often suggest influential players who were initially not presumed relevant to the study (Farquharson 2005).

Thirdly, this research also utilizes secondary sources such as press releases and reports issued by the European Commission, journalistic reports (Euractiv, EUobsever, and Economist), and quantitative data issued by Commission or international agencies. Secondary sources were expected to supplement official documents which sometimes say little about the concrete *preferences* of the actors involved.

Using this wide range of primary and secondary sources, this research aims to contribute to the operationalisation of the *preferences* of the Commission and the Member States in the external dimension of the EU internal energy market. Using a wide range of sources enables a good level of confidence in operationalising *preferences*: primary and secondary sources are expected to mutually supplement and support each other. While relying on a single source, or on a smaller number of sources, may lead to imprecise or even misleading conclusions about *preferences*, using a wide range of sources and comparing those sources increases the strength of the research in terms of reliability and validity. Data was selected for its relevance to the research question and with recourse to a wide range of sources.

Data collected was analysed through a process-tracing method. This method has been extensively used in PA studies "in order to multiply the observable implications of theory and observe hypothesized causal mechanisms at work" (Pollack 2003, 68). According to George and Bennett (2005), process-tracing attempts to identify the intervening causal process – the causal chain and causal mechanism(s) – between an independent variable – or variables – and the outcome of the dependent variable.

Rather than establishing causation in a strict sense, this thesis aims to establish and evaluate the link (or the absence of a link) between the independent variables and the dependent variable (Heritier 2008; Vennesson 2008). Hence, the method is deemed useful for observation of the effect of the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) on the Commission's deviation from Member States' *preferences* (DV) in the external dimension of the EU internal energy market.

Process-tracing is also deemed an indispensable tool for theory-testing and theory-development (Falleti 2006), not only because it generates numerous observations within a case, but also because these observations must be linked in particular ways to constitute an explanation of the case. Investigation of the ways in which the independent variables affect the dependent variable is expected to offer an explanation for the Commission's behaviour. In doing so, this research aims to contribute to the development of PA theory.

In summary, this thesis applies a qualitative case study method to take into account the variety of *preferences* of the Commission and the Member States in the external dimension of the EU internal energy market. Four cases have been selected for this research, based on three selection criteria: a) the involvement of the Commission, b) the variation across the independent variables and c) the external dimension of the EU internal energy market. Data has been collected using a wide range of sources, and analysed through the process tracing method.

3.7. Conclusion

This chapter has focused on the research design of this thesis. Firstly the research question was introduced: *under what conditions does the European Commission try to deviate from Member States' preferences in the external dimension of the EU internal energy market?* It was argued that the answer to this research question is expected to produce some generalizable results about the *preferences* of the Commission and its deviation from Member States' *preferences* (3.2.).

Secondly, the concept of agency behaviour has been operationalised in the dependent variable *Commission's deviation from Member States' preferences* (3.3). In looking for a categorization of possible agent's behaviour, this chapter has argued that the Commission's deviation can be operationalised as full compliance, responsive autonomy or deviation. This categorization will be revisited in the conclusion of this thesis, after the analysis that will be presented in four empirical chapters.

A third section looked at the dependent variables likely to affect the Commission in deviating from Member State *preferences: preference* alignment among the principals (IV1) and *preference* alignment between the principals and the agent (IV2) (3.4.). The section recalled the difference between *interests* and *preferences* and the challenges related to their operationalisation. The operationalisation will also be revisited after the analysis of the case studies. The chapter has also provided four testable hypotheses derived from the PA literature. In the methodology section, the qualitative case study approach was illustrated, together with methods of data collection and data analysis (3.6.). An overview of the cases has also been provided.

In the following chapters therefore, the four hypotheses of this research will be tested on four different case studies:

- *Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy* (Chapter 4);
- *Directive 2009/73/EC concerning common rules for the internal market in natural gas* (Chapter 5);
- The *Energy Community Treaty* (EnCT) (Chapter 6) and
- The *Energy Charter Treaty* (ECT) (Chapter 7).

Chapter 4 Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy

4.1. Introduction

This chapter is a case study on *Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy* (hereinafter: the *Decision*). The *Decision* introduced an information exchange mechanism not only between the Member States and the Commission but also among the Member States themselves. The *Decision* requires Member States to submit to the Commission all existing Intergovernmental Agreements (IGAs) that have an impact on the operation or functioning of the internal energy market or on the security of energy supply. The Mechanism is therefore meant to make the external relations of the EU and its Member States more transparent and coordinated. The Commission proposal was met with strong opposition from the Member States, and the legislative process was relatively complicated.

This case will address the research question as it will investigate the role of the Commission in the legislative process leading to the Decision. The chapter defines the *preference* alignment among the principals as *homogenous* (IV1) because the Member States had a similar preference for a sharing of information about IGAs. The *preference* alignment between the principals and the agent, however, is defined as *heterogeneous* (IV2) because the Commission had *preferences* different from those of the Member States (4.3.).

Consequently, the chapter investigates the following hypotheses: *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H1) and *when the preferences between the principals and the agent are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals* (H3) (4.4.). These two hypotheses predict different outcomes. The chapter, therefore, aims to assess which of the two independent variables has a major effect on the dependent variable.

4.2. Context: the EU internal energy market and Intergovernmental Agreements (IGAs)

This section recalls some information about the EU internal energy market and provides some background about the context in which Decision 994/2012 emerged. The EU internal energy market has three main features. Firstly, it is heavily dependent on energy coming from abroad, with imports of over 60% for gas and over 80% for oil (European Commission 2011d, 2). This dependency is particularly important for Member States such as those in Central and Eastern Europe for example, which are "highly dependent on one single source, at times up to 100 per cent" (Beyer 2012, 114). Secondly, the high energy dependency is worsened by the lack of homogeneous integration of the EU internal energy market. While western European countries have a relatively well-integrated energy market, the eastern European countries are quite isolated. This current situation is the result of what Nies (2008) effectively calls "*legacies* of past discoveries and the successive creation of European linkages". Indeed, most of the gas and oil pipelines were built during the fifties and sixties, and were the result of two different approaches coming from the two different sides of what, at the time, was a bipolar world. Certainly, those differences are still visible

today and explain why Eastern European Member States are heavily dependent on Russia (Ibid). Finally, another core feature of the EU energy market is that energy has traditionally been dealt with through bilateral agreements between the companies of the individual Member States on the one hand and non-EU energy producers on the other. In addition, negotiations with powerful energy suppliers in third countries have been supported politically with intergovernmental agreements (IGAs) between Member States and third countries. According to a rough evaluation of the Commission, there could be around 30 IGAs between Member States and third countries on oil and around 60 on gas in existence today (European Commission 2011e). IGAs are defined as "legally binding agreements between Member States and third countries which are likely to have an impact on the operation or the functioning of the internal market for energy or on the security of energy supply in the Union" (Ibid, 1). Their content might relate to the volumes of oil and gas imported into the EU from third countries, or to the conditions for the supply of these volumes through fixed infrastructure. The EU internal energy market can thus be described as a variously integrated one, highly dependent on energy coming from outside the EU, and dominated by IGAs.

The features described so far make the EU internal energy market extremely vulnerable to security of supply risks. The vulnerability of the EU internal energy market became apparent during the crisis between Ukraine and Russia in January 2009. After many years of gas disputes with neighbouring transit countries, Russia disrupted gas supplies through Ukraine, causing significant economic damage to the Member States who relied on supplies through these pipelines. It was in this context that a first step towards a sharing of information on IGAs was made with Regulation No 994/2010.[20] The Regulation was the first legal instrument under the new Energy Article 194 of the *Treaty on the Functioning of the European Union* (TFEU)[21] and it complemented the rules of the Third Internal Energy Market Package which aims at

[20] Regulation (EU) No 994/2010 of the European Parliament and the Council of 20 October 2010 concerning measures to safeguard the security of gas supply and repealing Council Directive 2004/67/EC (Security of Gas Supply Regulation), OJ 295, 12.11.2010, p. 1-22.

[21] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007 (2007/C 306/01). Available from http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML.

curbing the monopolies of the gas and power networks (Buchan 2010a, 361).[22] Regulation 994/2010 stipulated that information about gas contracts and international gas or pipeline agreements of the Member States and companies with third countries are to be sent to the Commission in an aggregated way. More precisely, under Article 1(6 a), Member States had to communicate existing IGAs by 3rd December 2011 and details of any new ones on conclusion (Beyer 2012).The regulation, however, did not foresee any exchange of information among the Member States. As a result, the problem of lack of information and transparency on IGAs was not solved by the Regulation. Originally, the Commission proposal for Regulation 994/2010 had foreseen the ex-ante notification of IGAs. Moreover, during the negotiations, some Member States, notably Italy, Greece, France and Germany, "were strictly opposed to giving the Commission a role to verify the compliance of intergovernmental agreement with internal market legislation" (Ibid). In September 2011, one year after the Regulation came into force, the coherence of the EU's external energy relations were again the centre of the debate between the Commission and the Member States. The European Council of 4 February 2011 not only "invited" Member States to inform the Commission of all their new and existing bilateral energy agreements, but also "invited" the Commission to submit a "communication on security of supply and international cooperation aimed at further improving the consistency and coherence of the EU's external action in the field of energy" (European Council 2011).

To summarise this section therefore, Decision 994/2012 emerged in a context where more transparency and coordination in the EU internal energy market was needed: the Decision was not created in a vacuum. Rather, it was the result of a long-term effort to address a problem that became more urgent after the Russia-Ukraine crisis of 2009: the coordination of the EU internal energy market. Prior to negotiations for the Decision getting started, the Member States had tried to improve the coordination of the EU internal energy market through Regulation 994/2010. This last instrument,

[22] The Third Energy Package is part of a broader liberalization process started in the 1990s with the aim of curbing the natural monopolies of gas and electricity and, in doing so, building an internal market for energy. The Package - in particular Directive 2009/73/EC – will be analysed as a case-study in the next chapter of this thesis.

however, proved insufficient and IGAs were addressed with a new Commission proposal in September 2009.

Before moving to the analysis of the legislative process leading up to the Decision, the next section operationalises the two conditions expected to affect the Commission's behaviour: the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2). The preferences of the Commission and the Member States are then operationalised with regard to the Decision.

4.3. Identifying the Independent Variables

This section identifies the independent variables of this research. The concept of *preferences* – together with the concept of *interests* – is a core part of the argument of this research and has been discussed in depth in the theoretical framework section (Chapter 2). It is worth recalling here that this research uses Milner's (1997) definition of *preferences* as "specific policy choices" and *interests* as "fundamental goals". For the purpose of this research, the *preferences* of the Commission are assumed to serve the *interest* of competence maximization, while the *preferences* of the Member States are expected to serve the *interest* of maintaining control over energy policy (2.3.2.). While this research looks at *interests* as given, deducing them from existing literature, the same cannot be stated for *preferences*. *Preferences* are specific and need to be defined on a case-by-case basis with regard to each case study of this thesis. This section therefore operationalises the *preferences* of the Commission and those of the Member States with regard to Decision 994/2012. Preferences are inferred inductively from a wide range of sources, as it is typical in qualitative research (3.5.2.).

4.3.1. *Preference* alignment among the principals (IV1): sharing information and protecting commercial interests

The aim of this section is to look at *preference* alignment among the Member States and assess whether they had homogenous or heterogeneous *preferences* on the information exchange mechanism.

A first expression of Member States' *preferences* can be found in the Conclusions of the European Council (2011, 4) where it is stated that

> "The Member States are invited to inform […] the Commission on all their new and existing bilateral energy agreements with third countries; the Commission will make this information available to all other Member States in an appropriate form, having regard to the need for protection of commercially sensitive information."

The phrasing of the Conclusions suggests that Member States have a *preference* for sharing of information about new and existing bilateral energy agreements with third countries. The sharing of information would have to be managed by the Commission with regard for the need for the protection of commercially sensitive information. Although useful, the Conclusions of the European Council only present the common position of the Member States and say little about the preferences of the individual Member States. The rather general wording of the Conclusion, therefore, needs to be supplemented with other sources.

A public consultation held by the Commission between 21 December 2010 and 7 March 2011, i.e. before the Commission issued the proposal for the Decision, is extremely helpful in tracing the preferences of some Member States, in particular the Czech Republic, France, Latvia, Lithuania, Netherlands, Poland and Portugal (European Commission 2011a). One of the questions asked by the Commission in the consultation refers explicitly to "the compliance with EU internal market rules and the EU energy security objectives of Member States' bilateral agreements with third countries".[23] The question asks whether Member States see any issue on the topic and whether and how should the EU take action to ensure compliance (Ibid).

Most of the Member States that replied to the consultation did so with general statements about the need of a coherent and focused EU energy policy suggesting that

[23] The Commission initiated on 21 December 2010 a public consultation on the external dimension of the EU energy policy in order to seek stakeholders' views on possible priorities and initiatives in this field. 7 Member States responded sending written contributions. The consultation was composed by 10 question. For the purpose of this chapter, the most relevant question is question 9: "Do you consider that the compliance with EU internal market rules and the EU energy security objectives of Member States' bilateral agreements with third countries can be an issue? Should the EU take action to ensure compliance? How?" (European Commission 2011a)

the "EU could take part in these bilateral cooperation by strengthening and improving cooperation with third countries" (Latvia 2011) , or stressing that the EU should ensure harmonisation between bilateral agreements with third countries (Ministério Dos Negócios Estrangeiros 2011).

Two Member States however stressed the need for more concrete approaches. Lithuania called for "concrete actions and mechanisms" to be "proposed in order to find the right balance between respect for Member States' right to choose their energy mix and energy security objectives of the EU as a whole" (Lithuania 2011). The Lithuanian contribution also stated that in this respect, the "exchanging of information on existing or new bilateral agreements is the first step" (Ibid). By the same token, the Poland's contribution suggested that "the EU should develop a coherent catalogue of its energy policy objectives towards individual geographical regions and individual countries" (Polish Minister of Economy 2011). This catalogue should then be "a foundation for a development of a catalogue of types of framework agreements in the field of energy, which would be concluded between EU and individual third countries". Finally, the Polish response stated that "transparency in the area of external energy policies of Member States should be improved in the near future" and that "compliance with the Community legislation should be a fundamental paradigm of international agreements concluded by Member States" (Ibid).

Distinct from the general statements about the need for a coherent EU energy policy Czech Republic, Latvia and Portugal, the contributions of Poland and Lithuania then, seemed to call for specific measures to be taken at European level in the near future. In contrast however, the contribution by the Netherlands was very clear in stating that "the Netherlands does not see any need for new mechanisms to ensure compliance with EU internal market rules and the EU energy security objectives of Member States' bilateral agreements with third countries" (The Netherlands 2011). Rather, it was argued, market infringements should be dealt with on a case-by-case basis according to existing legislation. The French contribution was closer to the Netherlands than to Poland and Lithuania, and argued that it was up to the Member States to transform European legislation in internal law, and make sure that bilateral agreement are

conform to European legislation (Représentation Permanente de la France auprès de l'Union Européenne 2011).

In summary, data collected through the consultation held by the Commission offered information about the position of seven Member States. Out of seven, only two Member States, Poland and Lithuania, stressed the need for more concrete measures, such as an information exchange mechanism and a catalogue of the types of framework agreements in existence. By contrast, the Netherlands stressed that no new mechanism was needed. What about the position of the other twenty Member States? Their silence leaves room for many interpretations: they might not have considered the consultation a matter of priority, for example, or they might have not wanted to make their position clear before the Commission had issued a proposal. The Conclusions of the European Council of 4th February 2011 suggest that Member States had a preference for *a sharing of information about the IGA managed by the Commission with regard to the protection of commercial interests*. These different sources seems to suggest that while only Poland and Lithuania stood up for "concrete actions and mechanisms", all the other Member States had a rather more general preference as expressed in the above conclusion of the European Council of 4 February 2011. Moreover, the fact that only Poland and Lithuania welcomed "concrete actions", suggests that, for the purpose of this chapter, the *preferences* among the Member States can be defined as homogenous. More precisely, the *preferences* of the Member States can be illustrated on a continuum. At one end of the continuum, Poland and Lithuania called for concrete measures while, at the other end, the Netherlands stated that no new mechanism was needed. The bulk of the Member States, however, were in the middle of this continuum having the following *preference,* as stated in the conclusion of the European Council of 4 February 2011:

a) *an information from the Member States to the Commission on all their new and existing bilateral energy agreements with third countries;*
b) *making this information available to all other Member States by the Commission in an appropriate form, having regard to the need for protection of commercially sensitive information*.

How is the above preference intended to serve the Member States' interest of maintaining control over energy policy therefore? The data analysed in this section suggests that Member States simply wanted the Commission to merely coordinate an exchange of information in the field of intergovernmental agreements. Stressing the need for an "appropriate form" and "protection of commercially sensitive information" in sharing information on IGAs, Member States made it clear that they did not want any interference from the Commission in their relations with third countries.

4.3.2. *Preference* alignment between the principals and the agent (IV2): united against the Commission's proposal

Having looked at the preferences alignment among the principals (4.3.1.), this section will assess the *preference* alignment between the principals and the agent. In order to do so, the *preferences* of the agent need to be identified. The proposal for an information exchange mechanism (hereinafter the proposal)[24] is particularly helpful in order to infer the *preferences* of the Commission. The proposal "transforms the conclusions of the European Council into a mechanism with detailed procedures for the exchange of information between Member States and the Commission with regard to intergovernmental agreements" (European Commission 2011d). The proposal suggests that the Commission had a preference for an information exchange mechanism with three main features:

a) Legal instrument for a mandatory exchange of information.

According to the Commission, only "clear obligations […] are capable of ensuring transparency" (Ibid, 3). Therefore, the proposal stressed that "a legal instrument for mandatory exchange of information" was "the only option" able to meet the policy objectives outlined in the proposal. In addition, the Commission deemed a Decision as more appropriate than a Regulation. With a Decision, the legal instrument would have no direct effect on individuals but would exclusively be addressed to Member States (Ibid: 3, footnote 8).

[24] Proposal for a Decision of the European Parliament and of the Council setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy COM (2011) 540 final.

b) Ex-ante control compatibility of the agreements with Union law

The Commission proposed a "flexible compatibility control mechanism" where the Commission – at its own request or on request of the Member State that is negotiating the IGA – could assess the compatibility of the negotiated agreement with Union law before the agreement is signed (Ibid, 5).

c) Participation as an observer in the negotiations with third countries

The proposal stated that "on request of the Commission or the Member State concerned, the Commission may participate as an observer in the negotiations" (Art. 3.2).

How is the preference for a legal instrument for a mandatory exchange of information, with the features described so far, expected to serve the Commission's interest for competence-maximization? By issuing a proposal with the features mentioned above, the Commission tried to grant itself additional competences in the field of IGAs, such as an ex-ante assessment of the compatibility of IGAs with the EU law and the right to participate in negotiations between Member States and third countries: a role for which Member States never asked. In other words, the proposal seems to suggest that the rationale underlying the Commission's preferences was one of competence maximisation.

Having identified the preferences of the Commission for this case, this section can now turn to a comparison between the preferences of the principals and those of the agent. Were those preferences homogenous or heterogeneous? The analysis of several primary and secondary sources suggest that the preferences between the principals and the agent were *heterogeneous*. Firstly, an Information Note from the General Secretariat of the Council effectively stated that there was "*strong opposition* from a large number of Member States" to the obligatory nature of some of the propositions in the Commission proposals (Council of the European Union 2012a, 2). The term "strong opposition" suggests that the *preferences* between the Member States and the Commission were heterogeneous. Furthermore, the wording "a large number of Member States" seems to confirm the point made earlier in this chapter about the homogeneity of preferences among the Member States (IV1): while only few Member

States had a preference for concrete measures, the majority of them did not welcome any mandatory mechanism. Secondary sources also seem to support what has been stated so far. In an interview with EurActiv (2012) Mr Krišjānis Kariņš, the rapporteur for the proposal stated that "the only large country that was really pushing for this legislation was Poland. The other countries supporting this were smaller countries". Additional interview data collected for this research also supports this statement. Firstly, a Commission official stated that "the majority of Member States" did not want a mechanism and assumed a very strong position against the proposal (Interview No 2). The same was confirmed by several officials working in a number of Permanent Representations: only few Member States found the Commission's proposal to be a good one there was no backing and a lot needed to be changed (Interview No 18); the opposition in the Council was strong (Interview No 11); and the legislative procedure was an "arm wrestling between the Commission and the Member States" (Interview No 7).

In conclusion therefore, both primary and secondary sources suggest that the Member States and the Commission had different *preferences* on Decision 994/2012. As has been argued earlier in this thesis, the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) are expected to affect the probability of Commission's deviation from Member States' preferences (DV). In the next section, a process-tracing method is applied to assess how the independent variables are likely to affect the dependent variable in this case study. As a reminder, this chapter is testing the following two hypotheses:

H1: when *the preferences among the principals are* homogenous, *the agent is more likely to try to deviate from preferences of the principals.*

H3: when the preferences between the principals and the agent are heterogeneous, the agent is less likely to try to deviate from the preferences of the principals.

These hypotheses aim to test the probability of deviation as agent's behaviour. They foresee different outcomes: H1 expects the Commission's attempted deviation to be less likely while H3 expects a Commission's attempted deviation to be more likely.

Hence, this chapter aims to assess which scenario is most likely to occur and which independent variable has a stronger effect on the dependent variable.

4.4. A Principal-Agent analysis of the legislative process leading to Decision 994/2012

This section analyses the decision-making process that began with the Council Conclusions of 4 February 2011 and concluded with the publication of Decision 994/2012 in the Official Journal on 27 October 2013. By applying the process-tracing method (George and Bennett 2005), this section will analyse the effect of the independent variables – the homogeneity of *preferences* among the principals (IV1) and the heterogeneity of *preferences* between the principals and the agent (IV2) on the Commission's deviation from Member States' preferences (DV). This section primarily builds on the investigation of documents related to legislative procedure such as Council Conclusions, Committee Reports and Opinions of the European Parliament. This data is then supplemented with secondary sources and interview data. This section is divided in five parts according to the main phases of the legislative procedure: the act of delegation, the Commission's behaviour when issuing the proposal, the reaction of the Member States, trialogues and the final outcome. Each subsection stresses the link between the legislative process and the theoretical framework of this research. The next section (4.5.) draws some conclusions from this case study. By way of conclusion, hypotheses 1 and 3 are confirmed or rejected.

4.4.1. The act of delegation and functions to be delegated

This case about the legislative process leading to Decision 994/2012 begins with the European Council Conclusions of 4 February 2011. These Conclusions invited the Commission to submit a communication on the security of supply and international cooperation, aimed at further improving the consistency and coherence of the EU's external action in the field of energy (European Council 2011). The Commission was also invited to make information about Member States' energy agreements with third countries available to all the Member States themselves.

This chapter argues that the aforementioned Council Conclusions are an act of delegation from the Member States as principals to the agent Commission (Bocquillon

and Dobbels 2013). Member States delegated the task of further improving the consistency and coherence of the EU's external action in the field of energy to the Commission. They also delegated the task to coordinate and ensure exchange of information as far as new and existing bilateral energy agreements with third countries were concerned. On a practical level, this also meant the management of making information on IGAs available to all the Member States.

Delegation through Council Conclusions is a targeted and specific delegation which reflects a broader delegation of legislative powers to the Commission in the Treaties. Decision 994/2012 has its legal basis on Article 194 of the Treaty on the Functioning of the European Union (TFEU) which establishes that the Ordinary Legislative Procedure is the method to be used to reach the aims of the "Union Policy on Energy".[25] In the Ordinary Legislative Procedure, the Commission has the sole power of initiative; this case is therefore useful in looking at the Commission as an initiator of new legislation.

Overall, Article 194 TFEU is a compromise between the Member States and the Commission. The Article states the aim of a Union Policy for Energy but also restates Member States' role in energy policy: "such measures shall not affect a Member State's right to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply." This means that Member States retain the right to conduct their bilateral energy relations with non EU countries (Braun 2011: 2). As effectively put by Andoura (2010: III) "the Energy Title is a carefully crafted compromise between national sovereignty over natural resources and energy taxation on the one hand and shared EU competence for other areas on the other".

Indeed the phrasing of Article 194 TFEU itself suggests that the Article is meant to guarantee a balance between a European approach to energy policy and Member States' sovereignty. Despite its ambiguous wording, the TFEU provides, for the first time, a clear legal basis in the energy field (Buchan 2010a; Buchan 2011a; Buchan

[25] According to Article 194 TFEU the aims of the "Union Policy on Energy" are the following: (a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks.

2011b; Braun 2011). This is seen by some authors as a delegation of power to the European Commission (Egenhofer and Behrens 2011). As such, while a first delegation of legislative power happens in the Treaty, a more targeted delegation is established through the European Council Conclusions.

This was also the understanding of the Commission. One Commission official stated clearly that the Commission was deemed the only actor able to ensure consistency and coherence: "Nobody else, if not the European Commission, can have this global vision on the security of supply" (Interview No 4). Indeed, both the Communication *On security of energy supply and international cooperation*[26] and the proposal[27] make clear reference to the Council Conclusions of 4 February 2011. Indeed, the Communication recalls that the Council Conclusions reemphasized "strengthening the external dimension of the EU energy policy as one of the key priorities" (European Commission 2011b). As far as the proposal is concerned, the Commission stressed that it "transforms the conclusions of the European Council into a mechanism with detailed procedures for the exchange of information between Member States and the Commission with regard to intergovernmental agreement" (European Commission 2011c, 1). That the Commission felt it was delegated a clear task is apparent in data collected through interviews: the Commission came up with a strategy "following the request of the European Council" and the proposal came together with the strategy (Interview No 3). For the purposes of this case study therefore, the Council's request is considered an act of delegation.

As explained in the theoretical framework section (2.3.1.), in PA literature, there are four key functions or powers that principals may or should delegate to their agents (Pollack 2003).[28] In this case, Member States (principals) delegated the function of "monitoring compliance with agreements among the principals" (Ibid) to the agent

[26] Communication on security of energy supply and international cooperation - The EU Energy Policy: Engaging with Partners beyond Our Borders (COM (2011) 539 final

[27] Proposal setting up an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy (COM (2011) 540 final)

[28] Pollack states that Member States principals delegate four key functions to their supranational agents, namely: (1) monitoring compliance; (2) solving problems of 'incomplete contracting' among principals; (3) adopting credible, expert regulation of economic activities in areas where the principals would be either ill-informed or biased; and (4) setting the legislative agenda so as to avoid the endless 'cycling' that might otherwise result if the principals retained that power for themselves (Pollack 2003: 22).

Commission. According to the PA literature, concerns about non-compliance by other principals can prevent mutual benefit from cooperation. Because principals have incomplete information about the compliance of other actors, a significant transaction cost inhibiting cooperation may arise: "actors may find themselves unable to commit credibly to the mutually advantageous agreements because of their incentive for non-compliance and the lack of monitoring and enforcement mechanisms" (Ibid).

In this particular case, there is both incomplete information and the need for monitoring of compliance. Several sources need to be read in conjunction with the European Council Conclusions in order to understand the whole picture. It has already been stated that the European energy market is characterised by bilateral agreements in the field of energy. Bilateral agreements may be of two different types. Some bilateral agreements might be concluded by energy companies (commercial agreements). These bilateral agreements are often accompanied by a second form of agreement: IGAs signed by the governments of the importer, transit and consumer countries. IGAs can be very sensitive and are often treated as confidential, one reason as to why other Member States do not have complete information on them.

Consequently, a second point arises: the need for an agent in charge of monitoring for compliance. Member States are expected to comply with European law on energy. On several occasions both the Commission and some Member States have pointed out that not all IGAs comply with European Union law. The Commission stressed that "Member States are under increasing pressure to accept regulatory concessions in their intergovernmental agreements with third countries which are incompatible with Union energy law" (European Commission 2011, 1). Indeed, noncompliance may arise as complying with the changes introduced with the liberalisation of the electricity and gas market in the EU "is not always in the commercial interests of third countries suppliers" (Ibid). To summarise this subsection, Member States delegated the task of improving the consistency and coherence of the EU's external action in the field of energy, and of managing and making information on IGAs, to the Commission.

4.4.2. The Commission's behaviour: issuing an ambitious proposal

Following the "request" – or "delegation" in PA terms – of the European Council, the Commission issued a Communication on Security of Supply (COM (2011) 539 final) and a Proposal (COM (2011) 540 final). The proposal "transforms the conclusions of the European Council into a mechanism with detailed procedures for the exchange of information between Member States and the Commission with regard to intergovernmental agreements" (COM (2011) 540 final, p. 1). According to the Commission, an information exchange mechanism was needed as the *status quo* at the time the proposal was issued was "unsatisfactory" for many reasons. First of all, the Commission was not aware of most IGAs between Member States and third countries. Moreover, the Member States themselves lacked a mechanism to "keep abreast of developments" in the energy field. Indeed, the only transparency requirements adopted related only to the gas sector (see Regulation 994/2010). The Commission stated that "a legal instrument for mandatory exchange of information" was the "only option" to reach the policy objectives stated in the proposal, as voluntary information exchange on its own was proven not to be sufficient (Ibid).

With regard to existing IGAs, the proposal foresaw that Member States would send those agreements to the Commission "on at the latest three months after the entry into force of the proposed Decision" (Ibid, 6). The Commission then, would have made all the information available to the Member States via a database. Member States could have indicated whether any part of the information in the agreements submitted was to be kept confidential. The Commission, however, would have also been granted access to all the information.

What is remarkable in the proposal, however, are the provisions related to the IGAs which Member States may sign in the future. The proposal required that "Member States should already notify the intention to open negotiations to the Commission with regard to new intergovernmental agreements or amendments to existing intergovernmental agreements". In addition, not only should the Commission be kept informed about the ongoing negotiations, but it should also have the right to participate as an observer in the negotiations (Ibid, Art. 9). The rationale behind this provision

was that "without exchange of information already during the course of negotiation, it would be difficult to influence future intergovernmental agreements towards conformity with EU energy legislation" (Ibid, 4). The Commission also expected that, because Member States were given the opportunity to request the assistance of the Commission during the negotiations, the experience gained through this exchange mechanism would enable the joint development of voluntary standard clauses to be used in future intergovernmental agreements. The Commission's proposal also established that the Commission shall have the right to assess the compatibility of the negotiated agreement with EU law, in order to ensure that the agreement is lawful. In order to reach this objective, Member States have to submit any fully negotiated agreement to the Commission before the agreement is signed (Ibid, 6). The Commission then has a period of four months to assess the compatibility of the agreement. In short, the Commission proposed a legal instrument for a mandatory exchange of information, with an *ex-ante* control on the compatibility of the intergovernmental agreements with the EU energy law, and with a direct involvement as observer in the negotiations with third countries.

Did the proposal reflect the *preferences* of the Member States? In other words, did the Commission deviate from Member States' *preferences*? Data suggests that the proposal did deviate from Member States' preferences. The Commission proposed that Member States notify the Commission about their intention to open negotiations with regard to IGAs. This request is in apparent contradiction of the Member States' preferences for the protection of commercially sensitive information. As stated by an official of the Council of the European Union, informing the Commission – and by extension the other Member States – at the intention stage could have negative commercial implications (Interview No 17).

Moreover, as will become clearer in the next subsection, the Commission also proposed some points in addition to those foreseen by the Conclusions of the European Council. The question arises as to why the Commission presented such an ambitious proposal, even if it was very aware of the *preferences* of the Member States. According to an interviewee working in a Permanent Representation (Interview No 11), the Commission tried to "discharge" some responsibility in order to be able to claim that

the Commission did its part and that Member States did not want to follow. Other data suggests that the rationale underlying the Commission's preference for such a proposal was competence-maximization. As stressed by a Commission official, the Commission knew that some of the IGAs had provisions which were not in conformity with the internal market rules, such as third party access, price-setting and so on (Interview No 3). The proposal then was meant to give the Commission the tools to assess the compliance of IGAS to EU Energy law. It is for that reason that the proposal contained measures such as the ex-ante assessment of the compatibility of the IGAs, and the participation of the Commission in negotiations between the Member States and third countries (Ibid).

To summarise this section, the data seems to suggest that the Commission's proposal deviated from Member States' *preferences*, as the Commission did not take into account the *preferences* of the Member States' for the protection of commercially sensitive information. As the following section shows, the proposal also contained other elements not foreseen by the Member States.

4.4.3. Member States' opposition to the proposal: "take it or leave it"

Not surprisingly, the proposal engendered strong opposition among Member States. Indeed, Member States had clear preferences for the protection of commercially sensitive information and delegated to the Commission in the expectation that the communication and the proposal would have satisfied those *preferences*. According to the Council, however, the proposal contained "additional elements compared to the request from the European Council" (Council of the European Union 2012a, 2):

1. Member States should inform the Commission in detail before the start of any negotiation with a third country;
2. the Commission would have the right to be present at meetings throughout the negotiations;
3. Member States would not only have to send the (draft) agreement, but also each other relevant document to which the agreement refers - which could include commercial agreements;

4. the Commission would be given the opportunity and time to form an opinion on the compatibility of each draft agreement with internal energy market legislation before such agreement would be signed;

5. the Commission would develop "model clauses" that Member States could use.

Discussion within the Council showed that there was "strong opposition from a large number of Member States to the obligatory nature of points 1 to 4" (Ibid).

The majority of Member States found the Commission's proposal very "ambitious" as the Commission was granting itself the possibility of intervening on the agreements even before they were signed. In doing so, the Commission left themselves the possibility of entering into negotiations between a Member State and a third country (Interview No 7). This was seen by some Member States as "unfair" and as an "interference" (Ibid). Italy and France assumed possibly the strongest position. According to an Italian official, Italy could not accept those provisions that prevented the Member States from signing an agreement which the Commission did not deem conformed to the acquis (Ibid). Moreover, Italy could not accept that the Commission would be able to get involved in the negotiations between a Member State and a third country (Ibid). The involvement of the Commission in the negotiations of IGAs was seen as interference by the Commission in the relations between Italy and third countries. The above can be better understood if we take into the account the fact that Italy is involved in many IGAs with non-EU countries and, at the time Decision 994/2012 was being negotiated, was deeply involved in negotiations for the Trans-Adriatic Pipeline (TAP) for transporting natural gas from Azerbaijan to Italy.[29]

Germany, Belgium and the UK also opposed the proposal. In the German example, 44% of German gas imports originate from Russia (Westphal 2011). Moreover, the Russian-German agreement on the Nord-Stream pipeline is a very good example of IGA likely to affect the functioning of the internal energy market. As one German official commented (Interview No 28), the information exchange mechanism "was

[29] In the framework of Trans Adriatic Pipeline (TAP) project, a tri-lateral agreement was signed between Italy, Greece and Albania on the on 13th February 2013 (See: http://www.tap-ag.com/news-and-events/2013/12/05/italian-parliament-approves-ratification-law-on-the-tri-lateral-intergovernmental-agreement-between-italy-greece-and-albania-on-tap).

almost invented for Germany" which had signed several IGAs in the past. Regarding Belgium, a Belgian official argued that the country is traditionally privatised and that energy is dealt with in the framework of commercial contracts signed by energy companies to which the Government does not have access (Interview No 10). Thus, the Belgian position was that commercial contracts had to stay private and were not to be shared with the Commission. Finally, the UK raised three points of concern: a) the Commission's right to participate as an observer in negotiations of IGAs, b) the practical implications of the four-month standstill period for assessing an agreement, and c) the need to ensure the protection of confidential information (House of Commons, European Committee 2012). The UK has discussions on energy with Norway, Iceland, the Channel Islands, and more general trading arrangements with energy partners around the world, most notably with Qatar on gas. So far the UK has not experienced any direct intervention from the Commission in those agreements as they do not constitute a major issue of energy security. One of the main reasons for the UK opposition then, was that it saw the proposal as allowing the Commission to become involved inappropriately beyond its powers. In the eyes of the UK government "it is important […] that Member States retain the right to act on their own in a way consistent with EU law, and that the division of competence between member states and the EU is respected" (Ibid).

To summarise this section, apart from Poland and Lithuania, Member States opposed the Commission proposal as an attempt by the Commission to interfere in their relations with third countries and putting at risk their preference for the protection of commercially sensitive information. As stated in a Note of the Council "even though some other Member States support or could accept the obligatory nature of these provisions, it has not been possible in revised drafts of the Decision to do otherwise than to make the provisions 1 to 4 listed above optional, in order to prevent outright rejection of the proposal by a large majority of delegations" (Council of the European Union 2012a, 2). In PA terms, the threat of rejection can be seen as a control mechanism. Indeed, an outright rejection of its proposal would be seen by the Commission as a "slap" from its Member States principals and would negatively affect its credibility as an agent. The strong position assumed by some of the Member States constrained the Commission and they stepped back. As one Commission official

commented, the majority of Member States clearly said that they did not want any systematic mechanism. They offered a minimalistic mechanism instead, essentially saying "take it or leave it" and the Commission had to "go again in College and decide what to do" (Interview No 3).

4.4.4. Trialogues: looking for a compromise

In line with the Ordinary Legislative Procedure, both the Parliament and the Council started working on the Commission proposal. As stated in a Note from the General Secretariat of the Council to Coreper, the European Parliament's ITRE Committee voted on the draft amendments on 28 February on the basis of the report prepared by rapporteur Dr. Arturs Krišjānis (EPP, Latvia). Subsequently, the Council's Energy Working Party[30] examined these draft amendments and while, in the context of an overall compromise, several of them could be taken up, these amendments were reflected in a "Presidency compromise". The Note also stated that "although one or two delegations would prefer the text of Article 5(1) to be more in line with the Commission proposal and Parliament's position, there appears to be broad support for the present compromise text" (Council of the European Union 2012b, 2).

Article 5(1) was one of the three points on which the Parliament and the Council had divergent positions. The first point was Article 3(2) of the proposal on the exchange of information between the Commission and the Member States. The main divergence was about information to be provided from the Member States to the Commission about the intention to enter in negotiations with a third country, in order to negotiate a new IGA or amend an existing one. While Commission and the Parliament wanted this to be compulsory, the Council wanted it to be voluntary. Furthermore, the Council position was that "the Member States concerned shall indicate to the Commission whether this information may be shared with other Member States" (Ibid).

Secondly, Article 4 about assistance of the Commission was also matter of divergence. While the Commission proposed that a Member State may request the assistance of

[30] The Energy Working Party is one of more than 150 highly specialised working parties and committees that support the Council of Ministers. These groups are also known as the "Council preparatory bodies" (For a list of these bodies, see http://www.consilium.europa.eu/en/council-eu/preparatory-bodies/)

the Commission in the negotiations with third countries for the conclusion or amendment of IGAs, the Parliament amended the proposal by deleting that article. The Council instead, specified that on request of the Member State concerned, or on request of the Commission and with the written approval of the Member State concerned, the Commission may participate as an observer in the negotiations. The Council also proposed that, in cases where the Commission participated as an observer, it might provide advice on how to avoid incompatibility between the negotiated IGA and EU law.

Finally, Article 5, which deals with *ex-ante* compatibility control, was another main reason for controversy. The Commission proposed that it might, at its own initiative, assess the compatibility of the negotiated agreement with EU law before the agreement is signed. Thus, the Member States concerned would be required to refrain from signing the agreement for a period of four months following the submission of the draft intergovernmental agreement to the Commission for examination. The European Parliament proposed an amendment reducing this period to two months – but extending it to by a further two months if the Commission raised doubts about the compatibility with EU law. The Council rejected the amendment.

Based on the compromise text proposed by the Presidency of the Council, a first informal trialogue took place on 28 March 2012.In addition, there was a technical meeting on 29 March. Furthermore, the Presidency held bilateral informal consultations with delegations to assess their potential flexibility, if any (Council of the European Union 2012c). On the basis of these meetings, the Presidency proposed further changes. The most relevant changes proposed are the following:

- the initial assessment as to whether an IGA has an impact on the internal market for energy or the security of energy supply in the Union should be the responsibility of the Member States [and not of the Commission as in the Commission's proposal] and that, in case of doubt a Member States should consult the Commission (Art 4, p.6);
- the Commission "should have the possibility to inform Member States of its opinion on the compatibility" of IGAs [while according to the Commission

proposal the Commission has "the right to assess the compatibility" of IGAs with Union law, according to the Council] (Art 10, p. 13);

- the Council stressed that when the Commission makes all the received information available to all other Member States, that should happen in "secure" electronic form. Moreover, the Council also added a subparagraph stating that "if a Member State considers an intergovernmental agreement to be confidential, it should provide a summary thereof to the Commission for the purpose of sharing this summary with the other member states" (Art 12a, p. 14);
- the Commission "should develop optional model clauses" to be used in IGAs [while, according to the Commission proposal, the Commission "should recommend" those standard clauses] (Art 13, p. 15);
- on ex-ante compatibility control, the Council proposed that the Member States "shall, when in doubt about the compatibility of the negotiated agreement with Union law, inform the Commission" about IGAs [while the Commission proposal foresaw that Member States shall inform of all the IGAs likely to affect the functioning of the internal energy market (Art 5(1), p. 28);
- On confidentiality, the Council stressed that the Member States may indicate "in particular commercial information disclosure of which could harm the business activities of the parties involved" to be regarded as confidential (Article 7/3a, p. 33).

Overall, the changes proposed by the Council, aimed to providing more guarantees for the Member States. A second informal trialogue was held on 23 April. Communicating to Coreper the outcome of this trialogue, the Presidency underlined that it had indicated to Parliament that on the few remaining outstanding issues identified by the Parliament and discussed during informal trialogue, Council could potentially show flexibility on the review clause. Additionally, that the Council would furthermore examine what "aspirational" language it could offer on other issues. The Presidency stressed that a final effort should be made by the Council to accommodate Parliament's wishes, in particular on the issue of the review clause, with a view to reaching an agreement at the next and last informal trialogue (Council of the European Union 2012d).

The Presidency proposed another compromise text and called on delegations to show the required flexibility to accept the final compromise offer. The last informal trialogue took place on 9 May. The rapporteur informed the Presidency on 23 May that he believed there was a majority supporting the Council's final compromise offer (Council of the European Union 2012e).

The European Parliament adopted its position at first reading on 12 September 2012, making one amendment to the Commission proposal (13472/12). The outcome of the European Parliament's vote reflected the compromise agreed on between the institutions (Council of the European Union 2012f). On 4 October 2012, the Council adopted the text after Parliament's first reading, voting by qualified majority, and with all twenty seven Member States voting yes (Council of the European Union 2012g). On 25 October, the final act was signed and the procedure ended in Parliament. The final act was published in the Official Journal on 27 October 2012.

4.4.5. The final outcome: "we scrubbed everything"

The legislative process leading to Decision 994/2012 shows that the Decision was really the result of a compromise between the Council, the Parliament and the Commission. The Decision provides that Member States shall submit, by 17 February 2013, all existing intergovernmental agreements (Art. 1). The Decision also provides that "before or during negotiations with a third country on an intergovernmental agreement or on the amendment of an existing intergovernmental agreement, a Member State may inform the Commission (Art. 3(3)). Therefore, there is no obligation for the Member States to inform the Commission when they want to enter into negotiations with a third country as the proposal provided. The Decision asks Member States to communicate existing agreements (Art. 1) and allows Member States to ask for the assistance of the Commission in negotiations (Art. 5). In communicating those IGAs, the Member States may indicate whether any part of the information is to be regarded as confidential and whether the information provided can be shared with other Member States (Art. 4(1)). The access of the Commission itself to confidential information, however, shall not be restricted (Art. 4(2)). After having received the information, the Commission may make it accessible in secure electronic

form to all the Member States. When a Member State instructs the Commission not to make an intergovernmental agreement available to other Member States, the Commission only makes a summary of it available (Art. 7).

In addition, the final version of the Decision provides for an ex-post control mechanism when it states that "By 1 January 2016, the Commission shall submit a report on the application of this Decision to the European Parliament, the Council and the European Economic and Social Committee" (Art. 8 (1)). The report has a twofold objective. Firstly, it will assess "the extent" to which the Decision "promotes compliance of intergovernmental agreements with Union law and a high level of coordination between Member States with regard to intergovernmental agreements" (Art. 8 (2)). Secondly, the report will also assess the impact that this Decision has on Member States' negotiations with third countries and whether the scope of this Decision and the procedures it lays down are appropriate (Ibid).

Data suggests that the final Decision is very much closer to the Member States' position than to the Commission's proposal. The Commission tried to deviate despite the principals having fairly homogeneous preferences. As stated by an official working at the Commission, however, the Commission "lost" as it had to content itself with a "minimalistic mechanism" (Interview No 3). Interview data collected among officials working in a number of Permanent Representations also confirm this. As one official stated: "from the first version that [the Commission] produced to what we have decided there is nothing any more. All what [the Commission] wanted to have - the role of the Commission in the negotiations, the pre-information from the Member States […] before the agreement [was signed] – we scrubbed everything" (Interview No 11).

It seems sensible to argue that one of the reasons why the Member States managed to make deep changes on the Commission proposal, is that they were united in their opposition to the Commission. As indicated in official documents, only one or two delegations were supportive of the Commission proposal. Official documents, secondary and interview data states that those States were Poland and Lithuania. Given their strong dependency on Russia, and their difficulties in implementing the Third

Energy Package, they had a very weak negotiating position vis-à-vis Russia. Moreover, those countries suffered from the lack of coordination in the internal energy market. The fact that Germany had already signed an agreement with Russia for Nord-Stream – which excluded Poland – is a very powerful example of the way some Member States forge alliances with Russia and, in doing so, make the EU more dependent on Russian gas (Dempsey 2010).

4.5. Conclusion

This chapter has analysed a case study on the role of the Commission as agenda setter in *Decision 994/2012 on establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy*. The chapter investigated whether the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) affected the Commission in deviating from Member States' *preferences* (DV).

The analysis of the case suggested that Member States had homogenous *preferences* for a sharing of information about new and existing bilateral energy agreements with third countries. According to the model presented in this thesis, *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H1). PA literature argues that "when principals share preferences, the agent's discretion is expected to decrease" (Pollack 2003; Hawkins et al. 2006; Delreux 2011). Following this rationale, this thesis argues that when the discretion of the agent decreases, their deviation from Member States' *preferences* may also be expected to decrease, as it would be hazardous for the Commission to deviate from those *preferences*. One possible explanation is that principals sharing homogeneous preferences are likely to make an effective use of control mechanisms and sanctions in case of deviation (Pollack 1997, 116–7). The hypothesis however, does not seem particularly compelling in this case study. Data seems to suggest that although the Member States had fairly homogenous preferences, the Commission did try to deviate. This deviation, however, is better explained by the second independent variable of this research.

This chapter has argued that the Member States and the Commission had heterogeneous *preferences* (IV2). The latter had a preference for an information exchange mechanism with a) *a legal instrument for a mandatory exchange of information; b) an Ex-ante control compatibility of the agreements with Union law and c) participation as an observer in the negotiations with third countries*. This case, therefore, has tested the following hypothesis*: when the preferences between the principals and the agent are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals. (H3).* The PA literature argues that when the preferences between the principals and the agent are heterogeneous, the agent is expected to satisfy its own preferences rather than those of the principals (Pollack 2003) and "conflict situations" may arise (Da Conceição 2010, 1110). Data provided in this chapter indicates that the Commission did try to deviate from Member States' preferences generating a conflict with the Council. Officials working in several Permanent Representations have described the negotiation of the Decision as a "tug of war" or "arm wrestling" between the Commission and the Member States (Interview No 7). The Commission issued a proposal which did not take into account the preference of the Member States – notably the preference for the protection of commercially sensitive information. Rather, the Commission tried to satisfy its own preference for an exchange mechanism likely to expand its competence in the field of IGAs. A comprehensive role for the Commission was foreseen, such as ex-ante assessment control of compatibility, collection and sharing of information, and participation as observer in negotiations (4.4.2.).

This case shed light on the role of the Commission as agenda-setter, suggesting that the Commission attempted to deviate from the preferences of the Member States. The case shows that using the sole right of initiative, the Commission issued a proposal where the preferences of the Member States were not duly taken into account. In doing so, the Commission deviated from the Member States' preferences. To which of the typologies of deviation described earlier in this thesis (3.2.) therefore can this case study be ascribed? Data suggests that the Commission behaved in a way that was systematically different from the *preferences* of the principals and tried to grant itself an active role in the field of intergovernmental agreement. The Commission tried to

arrange for ex-ante assessments of the compatibility of IGAs with the EU law and for the right to participate in negotiations between Member States and third countries, which is a function Member States never requested. The Commission's proposal, therefore, generated a conflict situation between the Commission and the Council, and is thus taken as a case of attempted deviation. This point will be revisited in the conclusion (chapter 8) of this thesis, alongside the results emerging from the other empirical chapters.

The next chapter also looks at a case of internal legislation, analysing the legislative process leading to *Directive 2009/73/EC on common rules for the internal market in gas*.

Chapter 5 Directive 2009/73/EC on common rules for the internal market in gas

5.1. Introduction

This chapter is a case study on *Directive 2009/73/EC on common rules for the internal market in gas* (hereinafter the Directive). The Directive is part of the Third Energy Package which, in turn, is part of a broader liberalization process started in the 1990s with the aim of curbing the natural monopolies of gas and electricity and, in doing so, building an internal market for energy (Buchan 2010a, 361). The Directive introduces the concept of Ownership Unbundling (OU) which refers to the separation of the various stages of the gas chain: production, transmission, distribution, and supply. Such separation was already required by the Second Energy Package through legal unbundling, and Member States complied with that requirement in different ways. However, unsatisfied with the existing state of affairs, the European Commission proposed OU as its preferred option to realise a separation of supply and production activities from network operation (European Commission 2007c, 529). OU means that the same person or persons[31] cannot control both the stage of supply and transmission of energy. This means that companies controlling both stages – as it is the case for many companies in the EU – should give up control of one of them (Ibid). For this reason, the Commission's proposal for the Directive caused strong opposition from some Member States.

[31] The proposal uses the following terms: "person or group of persons", "legal person" (p. 6), "person or body" (p. 35), "natural or legal person". For the purpose of this chapter I will simply use the term "person".

This case is expected to contribute to the research question of this thesis by helping to provide insights on the behaviour of the Commission in the legislative process leading to the Directive. The chapter defines the *preference* alignment among the principals as heterogeneous because Member States had different *preferences* on how to implement unbundling. In order to compare the heterogeneous *preferences* of the principals with those of the agent, an *empirically informed small subset of Member States sharing homogenous preferences* is identified, as suggested in section 3.4.2. of this thesis. The use of this analytical device aims to contribute to the literature and is also revised in the conclusion of this thesis. The *preference* alignment between the principals and the agent is also defined as heterogeneous because the Commission had a preference for OU while the subset of the Member States had a preference for a third option of unbundling.

As a consequence of the values of the independent variables, this chapter tests the following two hypotheses: *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from preferences of the principals* (H2*)* and *when the preferences between the principals and the agent are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals* (H3). Testing these hypotheses is therefore expected to shed light on the Commission's deviation.

5.2. Context: Liberalizing the internal energy market

This section provides some background information about the internal energy market in gas. Notably, the section starts with an overview of the gas value chain and then moves to the concept of unbundling, as conceived in the process of liberalisation of the internal energy market. This has been undertaken by the Commission since the First Energy Package of the 1990s. Looking at the concept of unbundling is important in order to understand the context in which the proposal for the Directive analysed in this chapter emerged.

First of all, some preliminary information about the natural gas chain and how does it work is needed in order to understand the debate about Directive 2009/73/EC. The

natural gas value chain starts with discovering gas fields and ends with providing products to the consumer. The chain is composed of several stages:

1) production;
2) transmission;
3) distribution;
4) supply.

After production (1), gas is taken by pipeline towards a mainland terminal where it is converted into liquid – Liquid Natural Gas (LNG). LNG is stored in tanks before regasification. In the transmission stage (2), gas is transported through a network of high-pressure pipelines. Transmission is carried out by transmission system operator (TSO), a natural or legal person responsible for operating, ensuring the maintenance of, and developing the transmission system in a given area. Then, in the distribution stage (3), gas is transported on a smaller scale through local or regional pipeline networks. Distribution is carried out by a Distribution System Operator (DSO). Finally, in the supply phase (4), gas is sold to customers.

The stages above are related to two main groups of activities. While transmission (2) and distribution (3) are *network activities*, production (1) and supply (4) are *commercial activities*. Currently, in the EU energy market, vertically integrated companies, such as the French *Gaz de Franc*e and the German *RWE*, control both of these stages. This means that these energy companies control the entire gas chain from production to supply.

The Directive on Gas called for the separation of commercial activities from network activities because, as will be explained in more detail below, vertically integrated companies represent an obstacle for the competitiveness of the internal energy market. For this reason, the Directive prescribes that companies involved in production and supply cannot also be engaged in transmission and distribution, thus requiring that companies would be asked to divest ownership in one or both activities (Del Guayo, Kühne, and Roggenkamp 2010, 327).

So what was the rationale behind a third Gas Directive? What is the broader picture in which the Directive has to be considered? By separating production and supply activities from network activities, the Gas Directive aimed to boost the process of liberalisation of the gas market. The process of liberalisation of the gas market began in the 1990s with a first package of legislative proposals. It was, however, in the second package of legislative proposals, adopted in 2003, that unbundling was first proposed.

The Second Energy Package included an Electricity Directive (2003/54/EC) and a Gas Directive (2003/55/EC). The Directives introduced the concept of unbundling as "legal separation" between distribution and transmission "in order to ensure efficient and non-discriminatory network access" (see 2004/54/EC (8) and 2004/55/EC (10)). Legal separation, however, is different from Ownership Unbundling which was only going to be introduced in the Third Energy Package. Indeed, "legal separation does not imply a change of ownership of assets" (Ibid). From the proposals for a Second Energy Package (EC 2001) (COM (2001) 125), it can be inferred that the Commission already deemed ownership unbundling for transmission as "more effective" in guaranteeing non-discriminatory access. However, legal unbundling was the compromise achieved at that time.

The Second Energy Package required network operations to be legally and functionally separated from supply and generation or production activities. Member States were free to comply with that requirement by applying the preferred organisational structure. On the one hand, some Member States created a totally separate company for network operations. This was the case, for instance, with *Gasunie* in The Netherlands, which was split up into two autonomous companies: a gas transport company (NV Nederlandse Gasunie) and a purchasing and supply company for natural gas (Gasunie Trade & Supply BV) (Del Guayo, Kühne, and Roggenkamp 2010). On the other hand, some Member States decided to create a legal entity within existing integrated companies (e.g. *Gaz de France* in France).

Creating a legal entity within existing integrated companies however, led – according to the Commission (2007c) – to three types of problems. The first problem was a conflict of interests which could arise within integrated companies. Notably, while the

supply and production interests aim to maximise their sales and market share, the network operator is obliged to offer non-discriminatory access to competitors. When vertically integrated companies control both transmission and production/supply, they may use the transmission system operator, which is supposed to offer non-discriminatory access to competitors, to make entry more difficult for competitors. That means that the transmission system operator may treat its affiliate companies better than the competing third parties.

The second problem was that creating a legal entity within existing integrated companies could not guarantee non-discriminatory access to information. This was because there was no effective means of preventing transmission system operators from releasing market-sensitive information to the generation or supply branch of the integrated company. Third and finally, in an integrated company, investment incentives would be distorted as companies would try to limit new investments when those investments are likely to benefit their competitors.

According to the Commission, OU was the best way to tackle the aforementioned issues as it would have removed the distorted investment incentives of vertically integrated transmission system operators. It is in this context that the proposal for the Directive analysed in this chapter was issued.[32]

Before looking at the proposal and at the legislative process in detail however, the next section outlines the *preferences* of the Commission and those of the Member States, and then links these to the hypotheses that are to be tested with this case study.

[32] The Directive is part of the Third Energy Package which includes:
- Directive 2009/72/EC 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC;
- Directive 2009/73/EC of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC (analysed in this chapter);
- Regulation (EC) No 713/2009 of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators;
- Regulation (EC) No 714/2009 of 13 July 2009 on conditions for access to the network for cross-border exchanges in electricity and repealing Regulation (EC) No 1228/2003;
- Regulation (EC) No 715/2009 of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005.

5.3. Identifying the independent variables

This section determines the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) as far as the Directive is concerned. Member States' *preferences* were shaped as a reaction to the Commission proposal. It is therefore reasonable to start this section analysing the *preferences* of the Commission and then move to the *preferences* of the principals. The section will argue that the *preferences* among the principals were *heterogeneous*. Accordingly, the *preferences* of the principals will be compared to those of the agent and it will be argued that the *preferences* were also heterogeneous between the two actors (IV2).

Commission's preferences on unbundling: the "preferred option" (a) and the "alternative option" (b)

The Commission's proposal concerning common rules for the internal market in natural gas (European Commission 2007c, 529), which lead to the Directive which is the object of this case study, is very informative about the *preferences* of the Commission as far as the effective separation of supply and production activities from network operation is concerned. The document states that the Commission had "one preferred option" – Ownership Unbundling (OU) – and an "alternative option" – Independent System Operator (ISO). For the purpose of this chapter then, Commission's *preferences* are operationalised and ranked in the sense that the first *preference* was more preferred than the second. A description of each of the *preferences* – as expressed in specific policy choices (Milner 1997) – is offered below, together with the rationale underpinning them and the *interests* (or fundamental goals) they are supposed to serve.

a) **The "preferred option": Ownership Unbundling (OU)**.

The Commission's proposal stated that, as far as separation of supply and production activities from network operation is concerned, "the preferred option of the Commission remains Ownership Unbundling". The Commission expressed *preference* for a "clear ownership separation between transmission system operators and any

supply undertakings". OU means that a person controlling a supply undertaking[33] cannot, "at the same time, hold any interest in or exercise any right over a transmission system operator or transmission system" (Ibid), and vice versa (Ibid, 5).

Why was OU the preferred option of the Commission? By separating ownership of transmission from ownership of supply, OU would solve the inherent conflict of interests typical of vertically integrated companies. Indeed, as described in more depth in the context section of this chapter (5.2.), when the transmission system operator is a legal entity within an integrated company, it may treat its affiliated companies better than competing third parties. More specifically, within integrated companies there is a conflict of interest: while supply and production interests aim to maximise their sale and market share, the network operator is obliged to offer non-discriminatory access to competitors. However, the independence of the transmission system operator is almost impossible to monitor. Therefore, the transmission system operator may favour its affiliated companies over third parties. By providing an ownership – and not merely legal – separation between the transmission system operators and any supply undertakings, the Commission expected that OU would overcome the conflict of *interests* typical within integrated companies.

How then is the *preference* for OU supposed to serve what is assumed to be the Commission's *interest* for competence maximisation? "The Commission has been the champion of liberalisation in the European energy market" (Buchan 2010a, 361). As will be clear in the discussion of process-tracing (5.4.), the Commission's aim was to strengthen its role as protector of liberalisation of the energy market by curbing the monopoly of vertically integrated companies. OU entailed several tasks (or competences) for the Commission, such as the role of assessing the compatibility of the certification of transmission system operators with the legislation on unbundling. In contrast, other types of unbundling would have given more freedom – in terms of

[33] A "Supply undertaking" means "any natural or legal person who carries out the function of supply" (Directive 2009/73/EC (Art. 2(8)). More generally, a "natural gas undertaking" means "a natural or legal person carrying out at least one of the following functions: production, transmission, distribution, supply, purchase or storage of natural gas, including LNG, which is responsible for the commercial, technical and/or maintenance tasks related to those functions, but shall not include final customers" (Directive 2009/73/EC Art. 2 (1)).

actual implementation – to the Member States. According to the Commission, effective unbundling would "help to create supra-national transmission system operators as the operators are no longer held back by mutual distrust" (Ibid). Doing so would have curbed the monopoly of vertically integrated companies and contributed to a liberalised energy market where compliance with EU law was to be guaranteed by the Commission.

b) An "alternative option": Independent System Operator (ISO)

The Commission, however, was also aware that some Member States might have decided not to support OU and provided "an alternative option" called the Independent System Operator (ISO) (Ibid, 5-6). The proposal stated as follows:

> "This option enables vertically integrated companies to retain the ownership of their network assets, but requires that the transmission network itself is managed by an independent system operator – an undertaking or entity entirely separate from the vertically integrate company – that performs all the functions of the network operator."

The Commission clarified that the ISO option must provide the same guarantees as ownership unbundling regarding "independence of action of the network in question and the same level of incentives on the network to invest in new infrastructure that may benefit competitors" (Ibid). A legitimate question may arise: why was the ISO only a second best option after OU? According to the Commission, ISO would require "regulation and permanent regulatory monitoring" (Ibid, 6) in order to ensure that "the operator remains and acts truly independently of the vertically integrated company" (Ibid). Therefore, ISO lacks the guarantees of effectiveness and stability of the OU option. Indeed, only the latter could guarantee truly independent transmission system operators that were no longer held back by mutual distrust and, therefore, contribute to the achievement of EU-wide market integration. The latter can be seen as an expression of the Commission's *interest* for competence-maximisation because in promoting OU the Commission would perpetuate its role of "champion of liberalisation in the European energy market" (Buchan 2010a, 361).

c) Third country aspect

The Commission's proposal also contained a specific paragraph on third country aspects, which is crucial for the external dimension of the EU internal energy market. According to the proposal, effective unbundling would have applied not only to EU companies but also to non-EU companies. This means that companies of third countries wishing to acquire "a significant interest or even control over an EU network", would have to comply with the same unbundling requirements – whether OU or ISO - as EU companies (Ibid, 7).

Thus, the Commission proposed that companies of third countries cannot control transmission (a transmission system or a transmission system operator) unless a specific agreement between the EU and the third country is signed (Ibid, 7). Third country companies then, as for EU companies, needed to be certified by a national regulatory authority as having complied with the unbundling requirements. The Commission proposed that where a certification was requested by a transmission system owner or transmission system operator controlled by a person or persons from third countries, it should be denied, unless the transmission system owner or transmission system operator could demonstrate that there was no possibility for the entity concerned to be influenced by any operator active in the production or supply of gas or electricity, or by a third country (Art. 7b (2)). The proposal also provided that the certification of a transmission system operator should be notified to the Commission without delay. If, in examining the notification, the Commission found serious doubts as to the compatibility of the certification with the proposed legislation on unbundling, it could decide to initiate proceedings.

In summary, the Commission proposed the denial of third country control of the transmission of energy, unless guarantees of compliance to the proposed unbundling legislation are provided. The aforementioned provisions also granted the Commission the role of assessing the compatibility of the certification with the legislation on unbundling. The Commission justified this strong requirement by arguing that "the aim is to guarantee that companies from third countries respect the same rules that apply to EU based undertakings in both letter and spirit – not to discriminate against

them" (Ibid). Again, the third country aspect was deemed to achieve the goal of the proposal which was "promote competition in the European energy markets and promote the proper functioning of these markets" (Ibid, 7). The third country aspect stresses the relevance of the Directive in terms of external dimension. More precisely, by ensuring that the unbundling provisions would apply also to non-EU companies, the Commission wanted to make sure that external competitors do not undermine the further integration of the internal energy market.

This sub-section therefore has identified the *preferences* of the Commission as Ownership Unbundling. OU was the "preferred" option of the Commission, while ISO was only "the second best" (European Commission 2007c). In-depth analysis and interpretation of data suggest that the Commission's *preference* for OU is supposed to serve the *interest* of competence maximization. By breaking production and supply on the one hand and transmission and distribution on the other, the Commission seems to have aimed to break up the monopoly of vertically integrated companies that were deemed to be an obstacle to a competitive and liberalised energy market. In doing so the Commission seemed willing to reaffirm its role of "champion of liberalisation" in the European energy market (Buchan 2010a, 361). This seems to have been an important reason for the Commission proposing OU as the preferred option for unbundling.

5.3.1. *Preference* alignment among the principals (IV1): pushing for different options

Tracing Member State *preferences* on the unbundling is less straightforward. Much of the difficulty of this task is due to the wide range of situations across the energy markets of the Member States. For analytical purposes, this section looks at the *preferences* of the Member States after the Commission proposal was issued, since these clearly emerged in reaction to the Commission proposal. While the Commission had two *preferences* (a first preferred option and a second best option), for the sake of simplification and for the purpose of this chapter, each Member State is deemed to have only one preferred option from the following: a) Ownership unbundling (OU); b) Effective and Efficient Unbundling (EEU); c) Status quo.

In the following subsections, each option is analysed in detail. In order to infer the underlying *preferences* of the Member States, this section relies on four main sources. Firstly, the section builds on the comments sent by twenty delegations of the Member States to the Council before the Commission proposal was issued. In order to steer the debate on the four main issues which the Commission was supposed to address in the legislative proposal to be submitted in September 2007, the Presidency of the Council drew up four questions, one of which was on unbundling[34] (Council of the European Union 2007a). The twenty written contributions are a precious source of information as they allow understanding about whether those Member States were in favour or against "further unbundling measures".[35]

Secondly, a *Study on Unbundling of Electricity and Gas Transmission and Distribution System Operators* is also used as a source of information. The study, issued in 2006, reports an overview of the legal implementation of Gas Directive 2003/55/EC, which was the legislation in force when the proposal for the Directive analysed in this chapter was delivered. Reporting about the implementation of unbundling of each Member States, the study allows some inferences about the *preferences* of the Member States. Data seems to suggest that Member States who had already applied ownership unbundling would support the Commission proposal for OU because they would benefit, in terms of a more competitive energy market, from other Member States doing the same.

Thirdly, a Commission Staff Working Document accompanying the legislative package on the internal market for electricity and gas impact assessment (SEC(2007) 1179) (European Commission 2007a) reports some important information about EU Member States. It identifies Member States with full ownership unbundling in the gas sector (the TSOs of Denmark, the Netherlands, Portugal, Romania, Spain and the UK) together with the six Member States that had a derogation from the unbundling

[34] Together with unbundling, the other issues were effective regulation, adequate infrastructure and cooperation among network operators.

[35] For the sake of completeness the question was formulated as follows: "Effective unbundling. Should further unbundling measures, if proposed by the Commission, be applied only to the transmission networks or to distribution networks as well; and should electricity and gas be treated differently?"

requirements, i.e. Cyprus, Finland, Greece (until end 2006), Latvia, Lithuania and Malta. Finally, a letter sent from eight Member States to the President of the European Parliament Committee on Industry, Research and Energy (ITRE) Commission in January 2008, suggest a specific *preference* for those Member States (Représentation Permanente de la France auprès de l'Union Européenne 2008).

a) Ownership Unbundling (OU)

According to a Note of the Council of the European Union (2007r, 6) "a significant number" of Member States agreed with the Commission that effective separation of supply/generation activities from transmission network could best be achieved through Ownership Unbundling of the Transmission System Operator (TSO). Similarly to the Commission, the Council shared the view that OU was "the best means" to resolve the problems which occur when the TSO is a legal entity within an integrated company, namely "the inbuilt incentive to treat its affiliated companies better than the competing third parties and to limit new investment when this will benefit its competitors" (Ibid). Which Member States preferred the Ownership Unbundling? Comparing data from the multiple sources listed above, this chapter suggests that Belgium, Denmark, Finland, Portugal, Spain, and the UK had a *preference* for ownership unbundling. These countries were already fully unbundled or were granted a derogation under the 2003 Directive. This subsection looks at the specific position of the Member States preferring OU.

According to the **UK's** written contribution to the Council (Council of the European Union 2007b), "the present unbundling arrangements in many Member States are not adequate and […] more effective measures are needed." "Full ownership unbundling", instead, was expected to ensure two main results. Firstly, ownership unbundling must ensure market players that they would be granted non-discriminatory access to networks, and that market-sensitive information they provide to the network business was kept confidential and not used to commercial advantage (for example to the benefit of the affiliated supply or generation businesses). As a consequence, this would encourage and facilitate market entry by new generators and suppliers to compete with incumbent companies. Secondly, unbundling would provide the right incentives for network investments as it would overcome the problems that occur when separation

does not exist, notably, the risk that "network businesses fail to develop the network if this will enable new generators and suppliers to compete with the affiliated business" (Ibid).

Belgium's written contribution also confirms that "Belgium has always supported the idea of effective unbundling of competitive activities and regulated activities". One of the reasons suggested for the support of OU seems to be that "the network operator must therefore be as independent as possible of the incumbent operator so as to offer a level playing field to all market players" (Council of the European Union 2007l). Support for unbundling was also suggested by an interviewee working for the Permanent Representation of Belgium who confirmed that energy production in the country has always been in the hands of the private sector and the networks were always in the hands of the Government (Interview No 10).

The **Swedish** official position was quite clear on unbundling for transmission operators: "effective unbundling is a cornerstone in a well-functioning internal market" – but less clear on unbundling of distribution companies which Sweden did not see "neither necessary or desirable at this stage" (Council of the European Union 2007m). An official working within the Swedish Permanent Representation argued that Sweden was "quite a strong supporter of the unbundling principle" (Interview No 22). Unbundling was a priority for Sweden and OU was deemed the best solution to achieve harmonisation, while the other options – such ISO or the third option proposed by some Member States – were seen as "a bit complicated" (Ibid).

Denmark also had quite a strong position affirming that "effective unbundling is synonymous with ownership unbundling". More precisely, unbundling "avoids the adverse effects of alternative arrangements, viz. excessively detailed and complex regulation and disproportionately heavy administrative burdens" (Council of the European Union 2007p). **Finland** "supports the ownership unbundling of vertically integrated transmission system operators (TSOs)" as it would "guarantee that investment decisions […] would be made solely from the network business' point of view". The requirement of ownership unbundling, however, should not have been imposed to distribution system operators (DSOs), as network congestions are usually

not a problem in the distribution level, and non-discriminatory network access can be guaranteed with national legislation (Council of the European Union 2007g).

The position of **Portugal** was that, for transmission networks, full ownership unbundling should apply as "it is the only way to ensure competitiveness, non-discriminatory network access and effective creation of an internal energy market" (Council of the European Union 2007o). Finally, **Spain** also deemed that OU should be the first target for all the Member States "as situations involving extensive discrimination between countries might otherwise arise." In view of the results achieved in Spain, OU of transmission was expected to bring "high levels of liberalisation" (Council of the European Union 2007j).

As far as the third country aspect was concerned, Member States belonging to this sub-group did not show any particular concern. The UK's written contribution to the Council for example, stressed that OU unbundling would not have allowed upstream companies or third country supplier companies to control the network in the Member States (see written contributions) as was feared by some Member States having different *preferences*.

To summarise, data suggests that Member States supporting unbundling were already fully unbundled (Denmark, Portugal, Spain, UK) or were granted a derogation under the 2003 Directive (Finland). Supporting unbundling and extending unbundling to all the other European countries, was expected to break vertically integrated companies and boost competition in the European market, as all companies would have been expected to play according to the same rules. The *preference* for OU was supposed to protect the *interest* of maintaining control over energy policy, because OU was deemed the best policy-choice at national level.

b) Effective and Efficient Unbundling (EEU)

In January 2008, some of the Member States who were dissatisfied with the Commission proposal – Austria, Bulgaria, Germany, France, Greece, Luxembourg, Latvia and Slovakia – came up with a third option named Effective and Efficient Unbundling (EEU) (Représentation Permanente de la France auprès de l'Union

Européenne 2008).[36] The third option provided an alternative to unbundling that meant an "effective separation of supply and production activities from network operations based on independently run and adequately regulated network operations system" (Ibid). The main difference with the Commission proposal was that the transmission system operator was not supposed to be ownership unbundled. The third option instead provided a set of measures in order to guarantee the effectiveness and the independence of the TSO. In order to explain the *preferences* of the Member States belonging to this subgroup, this section first offers some information about the positions of the individual Member States and then looks at the main features of the third option.

What kind of Member States supported a third option? The argument presented in the previous section would already suggest that the countries belonging to this subgroup do not have unbundled markets. In fact, **Greece** and **Latvia** were granted exemption for the application of the 2003 Directive, **France** and **Germany** had implemented the 2003 Directive while Austria and Slovakia had implemented that Directive only partly. Again, the written contributions sent to the Council are particularly useful in understanding the *preferences* of the Member States. **Austria**, for instance, rejected full ownership unbundling as it would have meant "excessive interference in ownership rights". According to the Austrian position, there was no need for new legislation, rather "full implementation and exploitation of the existing legal framework in all Member States" was needed (Council of the European Union 2007i).

Greece had a similar position to Austria, stating that "the legislative framework of the Member States is adequate for the efficient operation of the energy market." The issue of ownership unbundling was to be examined again at a later stage, when there would be sufficient data to evaluate the progress of the liberalised markets of all twenty seven Member States (Council of the European Union 2007e). **Bulgaria**, in which the process of legal unbundling had been recently completed, was also in the position of

[36] Media offers contradictory data about the number of Member States wishing a "third way to unbundling". At times it is argued that they were seven, others that they were eight. I take the letter signed by eight Member States in January 2008 as reference.

retaining the current approach for an "independent, legally and organisationally unbundled system operator" (Council of the European Union 2007h).

According to **Slovakia** "the common internal market was not ready to support ownership unbundling of networks. […]. As stated in the written contribution, "Slovak Republic in contrary to the Commission doesn't regard unbundling as the best and universal tool for development of an internal energy market". Rather, "national conditions, such as size of the markets and its structure", are particularly influential. Moreover, Slovakia was sceptical of the Commission's argument that that "realisation of unbundling is able to eliminate all barriers that are limiting the investment" (Council of the European Union 2007d).

The biggest and more vocal countries in this subgroup however, were **France** and **Germany**. The French position was that full ownership unbundling "would undermine property rights, introduce a high degree of legal insecurity for investors and have consequences for the organisation of the sector that would be both major and difficult to predict." Moreover, France warned against "moving toward a single solution without having envisaged and studied other possible models." France proposed the Regulated Unbundling model (RUN), stating that is was "less radical and more comprehensive than that involving full unbundling of ownership" (Council of the European Union 2007d). **German** industry and politicians defined OU as an "expropriation" measure against the property rights of network owners (Buchan 2010a, 362; Del Guayo, Kühne, and Roggenkamp 2010). Indeed, the German energy sector is privately owned and energy rights are constitutionally guaranteed (Ibid).

As far as the third country aspect is concerned, some Member States belonging to this sub-group feared that OU would weaken the position of their national companies vis-à-vis companies from third countries. This concern was particularly clear in the written contribution produced by the French delegation (Council of the European Union 2007d). Other sources suggest that Germany and Austria feared that the third country clause – as it was in the Commission's proposal – could have damaged the bilateral agreements through which they had already secured their gas supply (Gutiérrez and Kostadinova 2008).

What kind of option was proposed by the countries mentioned so far? The third option was composed of two pillars. Firstly, as far as the *organisation and governance of the undertaking* was concerned, this option imposed "strict obligations" on the vertically integrated undertakings, in order to guarantee the effective independence of the TSO. Moreover, according to this option, the organisational framework was to be implemented and controlled "by compliance officer and public authority" in the respective Member State. Secondly, the role of the national level was also stressed for *grid investments, market integration* and *connection of new power plants*. The option proposed a national network development plan and, only in case the transmission system operator was not willing to realise an infrastructure identified as necessary in the plan, the role of the regulatory authority was foreseen. The third option also proposed the fostering of regional cooperation, with the possibility of designating a regional coordinator in charge of facilitating the dialogue between all national competent authorities, TSOs and power exchanges.

The third option seems then to suggest that Member States aimed to keep national control and oversight over the system. More precisely, they proposed a system that would be implemented and controlled at national level. As far as the development of network was concerned, the letter proposed a national network plan and, potentially, some sort of regional cooperation. The points analysed so far seem to suggest that the *preference* for EEU was actually intended to allow Member States to keep national control and oversight of the system.

c) Status quo: Member States depending on only one gas supplier

Other Member States – such as Cyprus, Czech Republic, Estonia, Ireland, Lithuania, Poland, Slovenia – were against OU, although they did not join the group proposing a third option. Member States belonging to this third subgroup were particularly concerned that OU would have a negative impact on their gas market because they were not interconnected, with centralised and limited gas markets or were heavily dependent on one external supplier. These countries were particularly concerned that the third country clause – as in the Commission's proposal – would have weakened their position vis-à-vis their main suppliers.

Small island states, such as Cyprus, and countries with a centralized and limited market in gas, such as Czech Republic, seemed concerned that OU could have had a negative impact. **Cyprus**, for instance, argued that OU "would give rise to additional, increased administrative and operational expenses which would have a direct negative impact on consumers" (Council of the European Union 2007q). In order to avoid such consequences, then, the decisions on further unbundling measures should be "left to the discretion of the Member States (principle of subsidiarity)" (Ibid). Similarly, the **Czech Republic** had serious concerns that ownership-separated companies might see their market position significantly weakened, thus also affecting their negotiating position in relation to capital-powerful suppliers. Their concern was that this weakened position could be reflected in prices for end customers (Council of the European Union 2007f). **Estonia** was also concerned about the consequences that OU could have on Member States with only one (monopoly) supplier on the market, as well as deliveries from only one source (Council of the European Union 2007k).

Lithuania expressed the opinion that, before proposing new legislation on OU, the Commission should have assessed the "influence of vertically integrated companies from the third countries on the liberalised EU market" as a "topical issues". More precisely, the Lithuanian delegation argued that the EU internal energy market needed to be protected from distortion of competition by the vertically integrated energy companies from the third countries. Lithuanian concerns are sensible if we think that Lithuanian gas is supplied from a single external gas supplier, Gazprom, and the degree of integration in the gas market is low because Lithuania has a single interconnection with the EU Member States (interconnection with Latvia), which is meant to ensure gas supply solely in extreme situations (Council of the European Union 2007n).

The **Polish** position was that the full implementation of Directive 2003/55/EC provided "sufficient foundation for creating a uniform market for natural gas." Poland feared that should the ownership unbundling be properly defined, external gas suppliers to the EU would pose a threat to taking over natural gas enterprises. More precisely, Poland did not support ownership unbundling of the Distribution System Operators because it could mean such enterprises would need to be sold, leading to a

situation where "the dominating natural gas supplier takes over strategically important market segments". According to the Polish delegation, this was the case, as the main external suppliers do not have to comply with Community unbundling regulations" (Council of the European Union 2007k). Finally, according to the **Slovenian position**, "new measures were not needed yet because some Member States were still implementing legal unbundling" (Council of the European Union 2007c).

To summarise the *preferences* of the Member States belonging to this subgroup, the main reason for their opposition to OU was that, because they are heavily dependent on one non-EU supplier and are not well connected to the rest of the EU market, they feared that OU might have weakened their positions towards the suppliers. Those Member States would have rather kept the status quo than introduced new legislation requiring OU. As for the previous subgroups, the *preferences* of these countries were supposed to protect their *interest* for maintaining control over energy policy. Rather than accepting OU as the only option proposed by the Commission, Member States belonging to this subgroup seemed keen to adopt a system of unbundling in line with their national energy policies.

To summarise this section on the *preferences* of the Member States on Directive 2009/73/EC, it has been argued that Member States had heterogeneous *preferences*. Member States can be divided in three subgroups:

a) **Member States preferring OU.** Member States already fully unbundled (Denmark, Portugal, Spain, UK) or exempted under the 2003 Directive (Finland), expected OU to bring competitiveness, non-discriminatory-network access, and harmonization of the internal energy market.

b) **Member States preferring Effective and Efficient Unbundling (EEU).** Member States willing to keep to keep national control and oversight over the system, refused the Commission proposal for OU and proposed a third option in which the transmission system operator did not need ownership unbundling.

c) **Member States preferring the status quo.** Member States heavily dependent on one non-EU supplier and not well connected to the rest of the EU market,

had a *preference* for keeping existing legislation rather than introducing a new obligation of OU.

As described more thoroughly in the research design section (3.4.2.), when the *preferences* of the principals are heterogeneous – as seems to be the case here, an analytical device needs to be introduced in order to compare those *preferences* with those of the agent. More precisely, an *empirically informed small subset of Member States sharing homogenous preferences* has been identified. Preliminary research on this case suggests that Member States preferring Effective and Efficient Unbundling (EEU) were the most active; it therefore seems sensible to take them as a subset that represents the *preferences* of the principals to be compared to those of the Commission. As the following section (5.4.) will explore more in detail, those Member States really led the fight against the Commission proposal and were highly influential during the legislative process. The value of this analytical device will be revisited in the conclusion of this work when presenting the potential contribution to PA literature. In the next section, the *preferences* of the principals – as represented by the subset – are compared to those of the Commission in order to analyse the impact of the second independent variable, the *preference* alignment between the principals and the agent.

5.3.2. *Preference* alignment between the principals and the agent (IV2): divergences on OU

In this section the *preferences* of the principals are compared to those of the agent in order to assess whether the *preferences* between the principals and the agent were homogeneous or heterogeneous (IV2). The *preference* alignment between the principals and the agent is expected to affect the Commission in its deviation from the *preferences* of the Member States.

In the previous section the *preference* of the Commission has been identified as a *preference* for Ownership Unbundling (OU). OU is defined by the Commission as "clear ownership separation between transmission system operators and any supply undertakings" (European Commission 2007c). On the other hand, the *preferences* of the Member States were found to have been heterogeneous because the Member States had different *preferences* on unbundling. More precisely, some Member States had a *preference* for OU (a), others for EEU (b) while others preferred the status quo (c). In

order to compare the *preferences* of the Member States with those of the Commission, the previous section introduced an *empirically informed small subset of Member States sharing homogenous preferences*. The small subset identified was the one having a *preference* for Effective and Efficient Unbundling (EEU).

This section therefore argues that the Commission and the Member States had heterogeneous *preferences* on the Directive. Simply put, the Member States had a *preference* for EEU while the Commission had a *preference* for OU. In line with the PAM, the *preferences* were meant to serve difference *interests*. Data seems to suggest that one of the reasons why the Commission supported OU was to serve its *interest* of competence maximization, while the Member States, as represented by the small subset, seemed to support EEU as a means to keep national control over the system.

How do the two independent variables affect the Commission's deviation in the external dimension of the EU internal energy market? As explained in more depth in the research design of this thesis (3.5.), *when the preferences between the principals and the agent are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals. (H3).* More precisely, when the principals and the agent have different *preferences*, "conflict situations" might arise (Da Conceição 2010: 1110) as the Commission is expected to satisfy its own *preferences* rather than those of the Member States (Pollack 2003).

As far as the *preferences* of the principals are concerned, this case study allows testing of the following hypothesis: *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from preferences of the principals (H2).* Indeed, the PAM assumes that the Commission might exploit the fact that Member States have heterogeneous *preferences* to deviate from those *preferences*. The Commission can "shirk within certain limits, exploiting cleavages among the member states to avoid sanctions, Council overruling of decisions, or alteration of the agent's mandate" (Pollack 1997, 129). Moreover, having agenda-setting powers, the Commission might also "push through those proposals closest to its own preferred policy that also can garner a qualified majority in the Council" (Ibid). One of the possible reasons for this kind of scenario is that heterogeneous *preferences* among the

Member States make the use of control mechanisms and sanctions more costly and complicated.

In the following section, the legislative procedure leading to the Directive is analysed by way of process-tracing in order to assess how the two independent variables can be seen to have affected the Commission's deviation from Member States' *preferences*.

5.4. From the Proposal to the Final Outcome: tracing the legislative process leading to Directive 2009/73/EC

This section analyses the decision-making process leading to *Directive 2009/73/EC on common rules for the internal market in gas*. By applying the process-tracing method, this section aims to analyse the effect of the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) on the Commission's deviation from Member States' *preferences* (DV). According to the hypotheses recalled earlier in this chapter (5.3.2.), in this case study, the Commission is expected to try to deviate from the *preferences* of the Member States because the *preferences* among the principals are heterogeneous as are the *preferences* between the principals and the agent.

This section is grounded primarily on documents related to the legislative procedure such as Council Conclusions, Committee Reports and Opinions of the European Parliament. This data is then supplemented with secondary sources and interview data. This section is divided in eight parts relating to the main phases of the legislative procedure: 1) the act of delegation, 2) the Commission proposal, 3) Member States' reaction to the proposal, 4) the third way, 5) the unbundling of German companies, 6) the Council's broad agreement, 7) the debate in the Council and 8) the informal compromise, second reading and final act. In each subsection, the link between the legislative process and the theoretical framework of this research is stressed. The final section will conclude that hypotheses 2 and 3 of this study have been confirmed in this case.

5.4.1. The act of delegation: European Council of 8/9 March 2007

The analysis of this case study starts with the Conclusions of the European Council of March 2007, which agreed on the need for an "effective separation of supply and production activities from network operations (unbundling)" (European Council 2007, 16). The European Council agreed on an Action Plan (2007-2009) for an "Energy Policy for Europe" (EPE) comprising several priority actions, among which were some related to the "Internal Market for Gas and Electricity", which is the object of the analysis of this chapter. The European Council agreed, inter alia, on the need for "effective separation of supply and production activities from network operations (unbundling), based on independently run and adequately regulated network operation systems which guarantee equal and open access to transport infrastructure and independence of decisions investment infrastructure" (Ibid). The European Council invited the Commission:

- to provide additional clarifications related to the key measures envisaged and their impacts in time for the June Council (Energy);
- to elaborate together with Member States the medium and long-term forecasts for gas and electricity supply and demand, and to identify the additional investment required to satisfy EU strategic needs;
- to assess the impact of vertically integrated energy companies from third countries on the internal market and how to implement the principle of reciprocity;
- to assess access to gas storage in the EU.

Even more importantly for the purpose of this chapter, the European Council invited the Commission "to come forward with relevant proposals, including through the development of existing legislation where possible" (Ibid).

From a PA perspective, the European Council Conclusions may be seen as a target delegation from the Member States to the Commission. The primary act of delegation, however, is to be found in the Treaties where this legislative process has its legal

basis.[37] The co-decision procedure is adopted, i.e. the Commission has the sole power of initiative, which also makes this a useful case for studying the Commission as agenda-setter and initiator of new legislation. The European Council Conclusions are instead a target delegation through which the Member States gave the Commission a mandate to come forward with "relevant proposals" including the "development of new legislation" (Ibid).

5.4.2. The Commission's proposal: OU as "the best option"

As a response to the conclusion of the European Council, the Commission issued a proposal on 19 September 2007 (European Commission 2007c). The proposal started from the point that existing unbundling provisions were not sufficient to ensure a well-functioning internal energy market. As mentioned in the context section of this chapter (5.2.), the Second Energy Package had required Member States to adopt a legal unbundling and while some of them created a totally separate company for network operation, others created a legal entity within an integrated company. According to the Commission however, the latter solution had led to many problems in the energy market such as conflict of interests within vertically integrated companies, non-discriminatory access of information, and distorted investments incentives. In order to overcome these shortcomings, the Commission proposed OU as its "preferred option." The Commission deemed OU "the most effective and stable way of achieving effective unbundling of the transmission network and thus of solving the inherent conflict of interests" (Ibid).

Aware of the variety of situations that existed among the different Member States, the Commission also provided a so called "alternative option" for those Member States that did not want to choose OU: the "Independent System Operator" (ISO). ISO allowed vertically integrated companies to retain the ownership of their network assets. However, it also required that the transmission network was managed by an independent system operator. The latter was expected to be an undertaking or an entity entirely separate from the vertically integrated company and had to perform all the functions of a network operator. This second option, however, required regulation and

[37] EC Treaty (after Amsterdam) EC 055; EC Treaty (after Amsterdam) EC 095; EC Treaty (after Amsterdam) EC 047-p2.

permanent regulatory monitoring to ensure that the operator remained and acted truly independently of the vertically integrated company (Ibid, 6).

The Commission also made clear in the proposal that the requirement for effective unbundling was intended to be applied to both publicly and privately owned companies. Moreover, the Commission proposed unbundling requirements to apply to EU as well as non-EU companies. The Commission suggested that "third country individuals and countries could not acquire control over a Community transmission system or TSO unless this was permitted by an agreement between the EU and the third countries" (Ibid). The aim of this requirement was to guarantee that "companies from third countries respect the same rules that apply to EU based undertakings in both letter and spirit" (Ibid, 7). This point on the third country aspect stresses the external dimension of this case study. The Commission's proposal suggested that, by proposing that the unbundling requirements were to be applied by EU and non-EU companies, the Commission aimed to make sure that non-EU companies would participate in the EU internal energy market according to EU law. Having non-EU companies acting according to EU-legislation would strengthen competition inside the EU internal energy market and would strengthen the internal energy market, serving the Commission's *interest* of competence-maximization as "champion of liberalisation".

As stressed in the section on *preferences* (5.3.2.), the Commission's proposal was closer to the Commission's *preferences* than to those of the Member States as the European Council did not mention OU as an option. As clearly stated by an official of the Commission, the latter went for the most extreme option of "a clear cut system":

> "The Commission was always a bit sceptical about the possibility to ensure effective independence if you stay within the same group. That's why all discussion focused on how to practically ensure that if you are not ownership unbundled you still have sufficient guaranteed independence that the transmission system operator will not favour the group of companies he belongs to or will not influenced in a certain manner […]" (Interview No 1).

In the Commission's view, OU was therefore the most practical way to ensure unbundling and to ensure the independence of the TSOs. Other options would have required several safeguards to achieve the same objective. As highlighted by an official

working in the Commission "if you don't opt for ownership unbundling, the other options are extremely demanding in terms of oversight, safeguard measures and so on" (Ibid).

The Commission's proposal may be seen as rather opportunistic because it proposed a clear-cut system of full ownership unbundling as a first option. As mentioned earlier in this chapter (5.3.1.), data about the implementation of the 2003 Directive together with the written contributions produced by several Member States suggest that Member States had heterogeneous *preferences* on unbundling: some of them supported it, others defended the status quo of current legislation and others proposed an alternative option. This point seems to suggest that, as expected by the PA literature, the Commission exploited the fact that Member States had different *preferences* pushing forward a proposal "closest to its own preferred policy" (Pollack 1997, 129). Aware of the fact that Member States had different *preferences* on unbundling, the Commission put forward its preferred option of OU, leaving divided Member States working to find a common position.

To summarise this section, the Commission's proposal provided OU as the "preferred option" in order to guarantee "a clear ownership separation between transmission system operators and any supply undertaking." The proposal also proposed a second option, ISO, which would have allowed the vertically integrated companies to retain ownership of their network assets, but would have also required regulation and permanent regulatory monitoring in order to guarantee the independence of the TSOs. In PA terms, the Commission deviated from the Member States' *preferences* because it behaved opportunistically, presenting a proposal that provided OU (and ISO as an alternative) which was the Commission's preferred option but did not reflect the Member States' *preferences*. In the next section, Member States' reactions to the proposal are analysed to understand how the heterogeneity of *preferences* between the principals and the agent affected the Commission's deviation from the *preferences* of the Member States.

5.4.3. Member States' reactions to the proposal: struggling for a common position

A progress report of the Council of the European Union (hereinafter "the Council") states that "divergent views among Member States" existed on the Commission proposal (Council of the European Union 2007r, 07). Although Member States agreed that "effective separation of supply/generation activities from transmission activities" had to be achieved, they had different views on how such separation should be achieved (Ibid, 3).

A significant number of Member States agreed that OU was the best solution as it avoided problems like those outlined above, such as integrated companies having the incentive to treat their affiliated companies better than competing third parties, or limiting new investments when this will benefit its competitors. As suggested by several sources, among those Member States were Belgium, Denmark, Finland, Portugal, Spain, and UK. Those countries had already implemented some form of unbundling and would have benefitted from all other Member States unbundling their systems. Other Member States however, strongly rejected the Commission's proposal for OU. Moreover, they also rejected the Commission's alternative option of ISO because they did not see it as a genuine alternative to OU. Rather, ISO was seen as "a particular form of ownership unbundling" as it imposed the ownership unbundling of the body responsible for infrastructure management. Those countries saw OU and ISO as "infringing property rights" (Ibid, 4).

According to journalistic reports, France had the strongest position against the Commission proposal and Germany was its "most powerful ally among the antis" (The Economist 2007). Supplementing these sources with official documents and secondary sources suggests that the French position was the following: if full ownership unbundling "were to be imposed by a regulation, it would undermine property rights, introduce a high degree of legal insecurity for investors and have consequences for the organisation of the sector that would be both major and difficult to predict" (Council of the European Union 2007d, 149). As mentioned earlier in this chapter with regard to the *preferences* of the Member States (5.3.1.), the French position can be explained by the fact that the gas sector is dominated by vertically integrated companies which

would have been seriously damaged by OU. The same can be stated for Germany where the Government was "one of the fierce opponents to further unbundling" with the argument that unbundling was an infringement of property rights (Del Guayo, Kühne, and Roggenkamp 2010, 344). The opposition against the Commission's proposal was led by France and Germany who were also followed by smaller Member States arguing that their energy companies were "too small to be unbundled, especially in gas where they must confront foreign suppliers of considerable size" (Buchan 2010a, 362).

As far as the third country aspect is concerned, an investigation of several sources suggests that Member States' positions on this point were also heterogeneous. Member states in favour of OU did not manifest any concern on the third country aspect. The UK and Denmark, for example, stressed that OU unbundling would not have allowed upstream companies or third country supplier companies to control the network in the Member States (see written contributions to the Council, 5.3.1.). This latter scenario was indeed feared by many of the countries which opposed the Commission proposal according to which, they claimed, OU would have weakened EU energy companies against vertically integrated energy companies from the third countries (this was the position of, for example, Poland, Lithuania and the Czech Republic). The Council progress report statement about the third country aspect is therefore understandable. Most Member States agreed that limitations to TSOs' ownership by companies from third countries should aim only to guarantee that those companies respect the same rules that apply to EU undertakings and not to discriminate against companies from third countries (Council of the European Union 2007a, 7). This seems to reflect the concerns of the EU countries which had already secured bilateral agreements with third-country suppliers, such as Austria and Germany (Gutiérrez and Kostadinova 2008). The report also states that Member States agreed that further discussion was required on the *nature* and the *criteria* of the agreement enabling control by third country undertakings. More precisely, Member States required more guarantees about the agreement which, according to the Commission proposal, was needed to enable control by third country undertakings. What has been mentioned so far suggests that Member States opposing OU feared that it might have allowed third country

companies to control network operations in the EU; Member States in favour of OU, in turn, did not have that concern.

Member States' requests for further discussion on the third country aspect can also be seen as a control mechanism through which the Member States wanted to make sure that the final Directive would have reflected their *preferences*. Stressing that no discrimination should have been made against companies from third countries and requiring further discussion on the nature and criteria of the agreement enabling third countries to control undertaking, Member States aimed to shape the legislation according to their *preferences*. This point will be revisited in the coming subsections.

The *preferences* among the Member States therefore were so heterogeneous that the Council could not reach a common position (Council of the European Union 2007a, 07). Rather, Member States stressed some points needing further discussion, such as the third country aspect, making use of their control mechanism to direct the legislative process. The countries opposing both OU and ISO called for "another alternative ensuring a more effective unbundling without interfering with property rights and in line with the European Council conclusions" (Ibid). The Presidency therefore invited those countries to present a concrete alternative which is analysed more in depth in the next subsection.

5.4.4. The "third way"

Accepting the invitation of the Council to propose an alternative to OU and ISO, on 29 January 2008, eight Member States – Austria, Bulgaria, France, Germany, Latvia, Luxembourg and Slovakia – sent a letter to the President of the ITRE Committee, to the President of the Energy Council, and to the Energy Commissioner. The letter – also known as "third option letter" - presented an alternative position for ensuring an effective separation of production and supply and management of the energy distribution networks (Représentation Permanente de la France auprès de l'Union Européenne 2008). The core argument of these Member States was that competition could be achieved without full OU or a third-party oversight (ISO) as proposed by the Commission. On the contrary, they proposed an alternative – Effective and Efficient Unbundling (EEU) – with a number of safeguards concerning the independence,

management and investment decisions of the TSOs. The "third option letter" therefore, proposed provisions imposing strict obligations to be implemented and monitored by compliance officers and public authorities. The organisational framework, therefore, was to be implemented and controlled in each respective Member State. Accordingly, third country provisions on network investments were not required. This letter reflects specific *preferences* of the eight signatory Member States. As mentioned earlier in this chapter (5.3.1.), Member States proposing EEU wanted a system that would be implemented and controlled at national level.

What is important to stress is the way in which these Member States tried to influence the legislative process. The letter, sent to the ITRE Committee and DG Energy, can be seen as a manifest attempt to affect and control the legislative process. In PA terms, the letter can be seen as a particular control mechanism. Using an informal tool – a letter, which is not foreseen by the formal legislative procedure – these Member States made their *preferences* known to the Council, the Parliament and the Commission. It is also remarkable that the letter was sent by the Permanent Representation of France because France was the real leader of the opposition against the Commission proposal. Germany, an ally, and other smaller Member States were also dragged into it. This was noted by an official working in a Permanent Representation of a country which did not sign the third option letter: "it was a very tough negotiation and it was actually against the Commission, it was France leading the pack against the Commission supported by Germany" (Interview 10).

In the meantime, the debate in the Council went on and unbundling was again on the agenda in the 2854th meeting on 28 February 2008. As stated by a Summary provided by the Council, delegations still voiced "different opinions" concerning the Commission proposal; the third option presented by the eight Member States mentioned above was also taken into account. On that occasion, Member States could not reach a common position and agreed that further work in the Working Group and at Coreper was needed (Council of the European Union 2008a, 02).

This sub-section has therefore stressed the role of the heterogeneity of *preferences* among the Member States (IV1) in the legislative process. Member States had to deal

with a very opportunistic Commission proposal that did not really take into account the variety of situations existing in each State but instead only proposed a full OU as first option. The *preferences* among the Member States were so divergent that achieving a common position in the Council was impossible. France and Germany emerged as the most active Member States leading the opposition against the Commission's proposal and dragging other smaller States with them. This point seems to confirm the hypothesis mentioned earlier in this thesis (3.5.) that when the agent has preferences that are systematically different from those of the principals, conflict situations might arise (Da Conceição 2010, 1110). As also stressed earlier (5.3.2), the *preference* of the Commission for OU was deemed to serve the *interest* of competence-maximization as champion of liberalisation in the European energy market. France, however, had systematically different *preferences* as its energy gas market was dominated by vertically integrated companies such as *Gaz de France*, and OU would have forced those companies to sell their ownership rights. The fact that the Commission and a small group of very active Member States had different *preferences* created a conflict situation between the principals and the agent and strongly affected the Commission's deviation from the *preferences* of the Member States. This sub-section also indicates the usefulness of looking at a small subset of relevant Member States in order to compare the *preferences* of the principals with those of the agent. More precisely, the subsection suggests that the Member States presenting a third option were particularly active in opposing the Commission during the legislative process. This point will be revisited in the conclusion of this thesis (Chapter 8).

5.4.5. The unexpected unbundling of German companies

While France and Germany were leading a fight against the Commission proposal, German companies began, on their own initiative, to unbundle. This aspect is not covered in official documents. Media and interview data however confirm this point. On 28 February 2008, German energy giant E.ON made a proposal "to commit to sell its electricity transmission system network to an operator which would have no interest in the electricity generation and/or supply businesses" (EurActiv 2008). Similarly, on 5 December 2008 RWE AG announced that it had "submitted a formal statement of commitment to the EU Commission to sell its German gas transmission network (TSO

Gas)" (RWE AG 2008). RWE had ongoing proceedings with the Commission for non-compliance with legal requirements for its gas business and decided in agreement with the Commission to bring those proceedings to a close (Ibid).

The fact that German companies started to unbundle is also confirmed by interview data. One Permanent Representation official remarked how "during the negotiations, all of a sudden, the German companies decided to unbundle behind the back of Merkel" (Interview No 10). This was also confirmed by a German official who stated that Germany had some problems with unbundling at the beginning but then "companies had to unbundle because of financial restraints" (Interview 28).

The question remains then about what the link between the official German position and their firms. According to secondary literature (Eikeland 2011), DG Competition (DG COMP)[38] had started investigations and a court-filing against major companies such as Distrigaz, EdF, Suez-Electrabel and German E.ON, for breaching Community competition rules. Apparently, DG COMP "presented these companies with deals that would reduce fines for infringement of EU competition rules in return for the sell-off of their network business" (Ibid: 253). In doing so, DG COMP expected to weaken the incentives for the companies to lobby Member State governments and to provide leeway for other national forces to convince the governments to alter their stance (Ibid).

Although interesting, the analysis above still says little about the dynamics between the Member States and the Commission and about the *preferences* informing the official German position. The analysis carried in this chapter suggests that the main Member State objecting to the Commission proposal was France, with Germany as ally. France and the Commission had opposite ideas as far as the market for gas and electricity was concerned. As can be inferred from the written contribution they presented to the Council, France feared that OU would have seriously weakened European gas marketing companies in their dealing with foreign producers (Council of the European Union 2007d, 07). The Commission's proposal, instead, depicted

[38] For the purpose of this research DG Competition is not an actor. It is mentioned in this sub-section in order to provide some information about the unbundling of German companies.

quite a different scenario stressing the negative effects of vertically integrated companies in the EU internal energy markets (notably conflict of interests within vertically integrated companies, non-discriminatory access of information, and distorted investments incentives) (European Commission 2007c). Interview data suggests that France was the leader against unbundling, and that it had to work hard to come up with new proposals in order to lobby and get support for its position. According to a member of a Permanent Representation (Interview No 10) even after E.ON communicated its decision to unbundle, the German delegation kept supporting France:

> "the German official position remained: "we are against it" but behind their back they were doing it. So, in the end was France only who wanted something else".

Ultimately, only France was pushing for the third option. This research can say little about the reason for Germany's decision to support France in a blocking minority against the Commission proposal, a point that could be investigated by further research. What is important, however, is the dynamic between the Member States and the Commission. With limited information about the reasons informing the German position, it can be assumed that in supporting France, Germany was probably receiving something in return, and was not harming its national companies. More precisely, in pushing for a third option to be added in the final Directive, the latter would have left energy companies free to choose the options that would have suited them better.

5.4.6. The Council's broad agreement

According to the documents of the European Legislative Observatory, "although not all Member States could agree with all elements of the package" the Council reached a "broad agreement on the essential elements" of the internal energy market package in June 2008 (Council of the European Union 2008b). The broad agreement included OU as the first option and "an option allowing for an independent transmission operator (ITO) […] in order to take account of cases where arrangements are in place for a transmission system that belongs to a vertically integrated undertaking, which guarantees more effective independence of the TSO" (Ibid). This wording seems to refer to countries like France and Germany in which vertically integrated companies

own the transmission system. The ITO option, therefore, was developed as a compromise between the third option/EEU proposed in the letter of January 2008 and OU. Data suggests that the compromise was the result of French pressure and opposition to the Commission proposal. As confirmed by an official of a Permanent Representation of a country in favour of OU, the French delegation had to work hard to come up with new proposals, lobbying and seeking support for ITO (Interview No 10). In the end, ITO seems to be a variant of the "third way" (or third option).

On the third country aspect, Member States argued that "irrespective of the option retained to achieve effective separation" the issue of third country control of networks needed to be addressed in a non-protectionist way, to make sure that these companies respected the same rules that apply to EU undertakings, and to address Member States' concerns about third country control. The Council also highlighted its concern for "potential implications in Community competence and the handling of existing investment." The Council therefore called for a text to provide the criteria against which investment from third countries would be assessed, in particular referring to EU security of supply (Council of the European Union 2008b). This passage suggests that the delegations that were concerned that companies from third countries could have control over networks within the EU, managed to insert "security of supply" as a criteria against which investment from third country would be assessed. This point is particularly meaningful as it stressed the external dimension that is of particular interest for this case study. The Directive was not limited to the EU internal energy market; once in force it would have consequences on the relations between the Member States and third countries, notably those supplying gas. It does not come as surprise then that Member States heavily dependent on gas from non-EU countries did the most to draft a Directive that would have protected their national interests as foreseen by the model in this thesis.

The broad agreement reached by the Council in June 2008 then incorporated ITO as a third option. That means that the eight countries identified as the most relevant ones leading the opposition against the Commission managed to persuade the other delegations to include ITO as an option. On the third country aspect, this subsection has revealed that those countries that feared their companies would be weakened by

companies from third countries, managed to insert "security of supply" as criteria against which investment from third country would be assessed.

5.4.7. The debate in the Council: rejecting Parliament's amendments

The European Parliament adopted a legislative resolution on 9 July 2008. Firstly, the Parliament rejected the Commission's ISO option and endorsed the ITO model. More precisely, the resolution confirmed its endorsement of a proposal based on a Commission compromise text involving the "creation of independent transmission system operators" (European Parliament 2008). The proposal incorporated some aspects of the "third option" proposed by some Member States that allowed a company to retain the ownership of pipelines, if its management is in the hands of a TSO with "effective decision-making rights". However, in addition to the "third option," it also introduced some further safeguards of these rights. Moreover, as far as the ITO option was concerned, the resolution of the Parliament required that an independent Trustee should be appointed by the regulatory authority to safeguard the independence of the TSOs from the vertically integrated undertakings. The Parliament rejected the ISO option, but endorsed the ITO model.

After the European Parliament delivered its opinion at first reading on 9 July 2008 (adopting 122 amendments to the Commission proposal), the Council did not approve the Parliament's position and adopted a common position on 9 January 2009, communicating it together with a statement of its reasons to the European Parliament (European Council 2009, 09). There were two main points in the Council common position. Firstly, the Council confirmed its third option, the Independent Transmission Operator (ITO) "for the case a transmission system operator is part of a vertically integrated undertaking (VIU) at the entry into force of the Directive." According to the Council, the three options were to be conceived on equal footing. Distinct from the resolution of the European Parliament, the Council did not expected any Trustee should be appointed, were ITO chosen as an option. Secondly, as far as the third country aspect was concerned, the common position introduced a new Article which ensured that TSOs of third countries have to respect the same unbundling rules as Community TSOs. The Article also introduced "security of energy supply of the

Member States and the Community" as a criterion to be taken into account when deciding on a certification to be granted to third countries TSOs in order to operate on the network of a Member State. In addition, the main decision on certification was to remain with the national regulatory authorities while the Commission was asked to give its opinion (Council of the European Union 2009).

Data suggests that the position of the Council reflected the heterogeneity of *preferences* among the Member States. Firstly, the third option seems to be intended to accommodate the *preferences* of France. As stated by an official of a Permanent Representation supporting OU, "France got its ITO" (Interview No 10). Secondly, as far as the third country aspect is concerned, Member States made sure that TSOs of third countries had to respect the same unbundling rules as the transmission system operators of EU countries. As mentioned earlier in this chapter, this clause was particularly important to countries heavily dependent on Russia's Gazprom in particular. The concern for the influence of vertically integrated companies from the third countries on a liberalised EU market is apparent in several of the written contributions presented by the Member States to the Council, including those from Poland, Estonia, Lithuania, and the Czech Republic. These countries also attached particular importance to the security of Member States' energy supply as a criterion to be taken into account when certification was to be granted to third countries' TSOs. In addition, the fact that the main decision of certification had to remain with the national regulatory authority (and not with the Commission) can be seen as a control which Member States introduced. Member States seem to have tried to limit the role of the Commission in the certification phase. The proposal provided for a greater role for the Commission in establishing that the certification had to be notified to the Commission for it to examine it and, in case of doubts about its compatibility with the unbundling requirements, to decide to initiate proceedings (Art 7b (7)).

5.4.8. The informal compromise, second reading and final act

On 12 January 2009, the Commission issued a communication concerning the common position of the Council. According to the Commission, the common position of the Council contained "all the essential components of the Commission's proposal" and could therefore be "generally supported" (European Commission 2009, 907). The

Commission endorsed the three options for effective unbundling but stressed that it continued to "regard ownership unbundling as the best solution." The Commission also stressed that it could accept the third option of ITO "as a part of an overall compromise" but made clear that that option "must not be weaker than the common position and contain the strongest possible features a political compromise will allow." The Commission also accepted that the common position removed the binding oversight role of the Commission under the certification procedure. Indeed, under all the three options, the TSO has to be certified by the national regulator that only has an obligation to "take the utmost account" of the Commission's positions. On the so-called "third country clause" the Commission deemed the common position "acceptable as part of an overall proposal." The Commission accepted that an agreement with a third country was no longer a prerequisite to allow control by an investor from the third country concerned. More simply, under the certification procedure, Member States have to ensure compliance with any of the three unbundling options and "to refuse certification if this put at risk the security of supply of the Member States concerned or the Community" (Ibid).

Given that the Council and the European Parliament had different opinions on the proposal, informal talks were held between the Council, the European Parliament and the Commission, with a view to reaching agreement at second reading. At its sitting on 22 April 2009, the Parliament adopted, at second reading, amendments to the common position. According to the Council, those amendments reflected the compromise agreement between the three institutions and were accepted (European Council 2009, 1). The Council adopted all the European Parliament amendments on 25 June 2006 and the final act was published in the Official Journal on 14 August 2009. The main points of the final Directive are as follows. Firstly, Member States can choose between three options for separating supply and production activities from network operations: a) full ownership unbundling; b) the independent system operator (ISO); and c) the independent transmission operator (ITO). The Member States then did manage to add a third option to the Commission's original proposal which identified OU as best option and ISO as an alternative option. Moreover, as far as ITO is concerned, the Directive does not require any Trustee as was proposed as an

alternative by the European Parliament in first reading. Secondly, some important changes concerned the third country aspect. The first one was that Article 11 – on certification of TSOs in relation to third countries – does not foresee any agreement between the EU and the third country as was outlined in the Commission's proposal. Moreover, Member States managed to include security of supply as a criterion to be taken into account when granting certification. Finally, certification is principally dependent on the regulatory authority and less on the Commission, again a distinction from what was in the Commission's original proposal.

The final Directive then, seems to suggest that the Member States managed to affect the legislative process and to have most of their *preferences* reflected in the final Directive. Data analysed in this chapter provides some evidence in support of hypotheses 2 and 3. The *preference* heterogeneity among the principals (IV1) seems to explain, at least partly, the deviation of the Commission from the preferences of the Member States. It appears that the Commission took advantages in the variety of preferences amongst the Member States to push forward an ambitious proposal reflecting its own preferences. By the same token, the heterogeneity of *preferences* between the Commission and the Member States seems to provide some explanation for the deviation of the Commission from the *preferences* of the Member States.

5.5. Conclusion

This chapter has analysed a case study on *Directive 2009/73/EC on common rules for the internal market in gas*. The analysis indicated that the Member States had heterogeneous *preferences* on unbundling (IV1). More precisely, some of them were in favour of OU as proposed by the Commission (a), others proposed a third option, EEU (b) and some of them were in favour of the status quo, claiming that no new legislation was needed (c). The fact that the Member States had heterogeneous *preferences* has allowed testing of the second hypothesis of this thesis according to which, *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from preferences of the principals* (H2). The analysis shows that that the Commission did indeed deviate from the *preferences* of the principals potentially exploiting the fact that they had different *preferences* on unbundling. The Commission seemed to behave opportunistically, issuing a proposal

very close to its own *preferences* and proposing OU as the best option to be chosen by the Member States and ISO as second option.

In order to compare the heterogeneous *preferences* of the principals (IV2) to those of the agent, this chapter has used an *empirically-informed subset of Member States sharing homogenous preferences*. The eight countries proposing a third option - France, Germany, Austria, Bulgaria, Greece, Luxembourg, Latvia and Slovakia - were chosen as a subset given their particular relevance for this case study. Indeed, France and Germany led a real battle against the Commission proposal, managing eventually to include a third option in the final Directive. These two countries also managed to attract other smaller countries in opposing the Commission. Moreover, this chapter has sought to illustrate the convenience of using the small subset as analytical device because these Member States managed to affect the legislative process in opposing the Commission's proposal. This case study has tested whether, *when the preferences between the principals and the agent are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals* (H3). The analysis in this chapter has suggested that – pushing forward a proposal for OU and defending OU throughout the legislative process – the Commission deviated from the *preferences* of the Member States.

To which of the typologies of deviation described earlier in this thesis (3.2.) can this case study then be ascribed? As mentioned earlier in this section, the chapter has shown that the Commission deviated from Member States' *preferences* likely pursuing its own interests and – consequently – creating a conflict situation with the principals. The Commission acted in an opportunistic way and instead of proposing an unbundling which would have taken into account differences in the markets of the several Member States, put forward its preferred option which was essentially a battle against vertically integrated companies. That the Commission wanted to end the dominant position of vertically integrated companies, is also clear in its proposal (COM (2007) 529). Describing the shortcoming of situations in which a legal unbundling had been chosen (rather than an ownership one), the Commission points out the conflict of interests inherent to vertically integrated companies as the core problem. The *preference* of the

Commission was intended to serve the *interest* of competence-maximization as the "champion of liberalisation" in the energy market.[39]

This chapter has also shown what control mechanisms Member States can use in order to control the agent and influence the legislative process. Possibly the most interesting control mechanism for the purpose of this chapter is the third option letter, signed by the eight Member States which proposed EEU as an alternative to OU and ISO. Other control mechanisms are set in the Directive. Member States concerned that unbundling could have weakened the position of their companies vis-à-vis companies from third countries, managed to include several criteria according to which the certification was to be given to a non-EU company operating within the EU. Firstly, Member States ensured that the certification was to be given in the first instance by the national authority and not by the Commission as outlined in the proposal. This point is particularly relevant as the control of the process was kept at national level. Secondly, Member States managed to introduce energy security as a criterion to be taken into account when deciding whether to award certification or not. This latter point was clearly meant to please the Member States heavily dependent from one single external supplier.

The next two chapters consider the second way in which the *external dimension of the internal energy market* manifests itself (see section 3.2): initiatives aimed at the creation of an integrated energy market with third countries. These are the Energy Community Treaty (Chapter 6) and the Energy Charter Treaty (Chapter 7). .

[39] The Commission has been acting – both internally and externally - to make sure that the EU legislation on energy is implemented. Internally, since September 2011, the Commission launched 19 infringement case for non-transposition of the Directive 2009/72/EC (on electricity) and 19 cases for non-transposition of Directive 2009/73/EC (on gas)(EC 2012b). By 14 October 2012, only 12 cases had been closed and the rest of the proceedings were ongoing (Ibid). In 2012 and early 2013, reasoned opinions were sent to 16 Member States who still had not completed the transition (DG Energy 2014). At the end of 2012 and in the beginning of 2013, a number of Member States were referred to Court: Poland, Slovenia, Finland, Bulgaria, Estonia, the UK and Romania (Ibid). Externally, on 4 September 2012, the Commission also opened formal proceeding against Gazprom itself (Sartori 2013). The Commission wanted to investigate whether Gazprom "might be hindering competition in Central and Eastern European gas markets, in breach of EU antitrust rules" (EC 2012a). This seems to confirm that the *interest* – or fundamental goal of the Commission – is competence-maximization in terms of liberalization of the energy market.

Chapter 6 The Energy Community Treaty (EnCT)

6.1. Introduction

The two previous chapters examined two legislative processes concerning the internal energy market and its external dimension. This chapter and the next one in turn look at another aspect of the external dimension of the EU internal energy market (see section 3.2.): initiatives aiming at the creation of an integrated energy market with third countries. This chapter analyses the Energy Community Treaty (EnCT) which was signed in October 2005 and established an international organisation in which the EU[40] – representing all its Member States – is Party to the Treaty together with other Contracting Parties which are countries from South East Europe (SEE) and Black Sea (Energy Community 2006c).[41] The EnCT extends the EU internal energy policy to the other Contracting Parties on the ground of a legally binding framework.

This case is expected to contribute to the research question of this thesis by looking at the behaviour of the Commission in the EnCT. The chapter defines the *preference* alignment among the principals as homogeneous (IV1) because the Member States had similar *preferences* for a common market in energy with SEE. Homogeneous is also defined as the *preference* alignment between the principals and the agent (IV2) as the

[40] The Energy Community Treaty was signed in 2005 – when the European Community (EC) had legal personality - and is still ongoing today. Since 2009, however, the European Union (EU) has gained the status of legal personality. For the purpose of this chapter then, both the acronyms EC and EU will be used. The expression EC/EU is also used.

[41] The geographic scope of the EnCT has been indicated with several terms such as South East Europe, Western Balkans, and Black Sea Region. This thesis will mainly use the term South East Europe (SEE); the term Western Balkans will be also used as a synonym.

chapter highlights that the Commission and the Member States shared the same *preference* on this case.

Consequently, the chapter tests the following hypotheses: *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H1) and when *the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H4). Both hypotheses suggest that the deviation scenario is less likely to happen. This case therefore offers the opportunity to investigate whether other types of agent's behaviour – such as responsive autonomy and compliance – might occur.

6.2. Context

The EnCT was signed by the European Community and nine Contracting Parties of South-East Europe (hereinafter SEE): Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Romania, Serbia and Kosovo[42]. The aim of the EnCT is "to create a single regulatory space for trade in gas and electricity" (EnCT, preamble).

The SEE had been the object of the European Community's attention since the late 1990s when the Stability Pact for Southern Europe was launched to strengthen the efforts of those countries in fostering peace, democracy, respect for human rights and economic prosperity ("Stability Pact" 2014). The region had faced violent wars in Bosnia and Herzegovina (1991-1995) and Kosovo (1999). As a consequence, the area suffered from many political, economic and social issues. Concerning energy, in the late 1990s, SEE lacked a unified energy system. In the framework of an ongoing cooperation with the European Community, SEE countries committed to adjust their legislation to be in line with EC law in energy (Karova 2009). The long-term objective was the creation of a regional market that would be integrated with the EC internal energy market (Furfari 2012).

[42] The United Nations Interim Administration Mission in Kosovo pursuant of the United Nations Security Council Resolution 1244 (hereinafter Kosovo).

This section, therefore, will focus on the main steps leading to the conclusion of the EnCT in October 2005. Subsequently, the institutional framework of the EnCT and the decision-making process will be described.

6.2.1. Milestones

The origin of the EnCT is generally linked to the so called *Athens Process* to indicate the institutions that were established by a first Memorandum of Understanding signed in November 2002 by Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Romania, Turkey, Yugoslavia, and Kosovo. The Athens Memorandum set up a number of institutions: the Ministerial Council, the Permanent High Level Group (PHLG) and the South East Europe Electricity Regulation Forum (Athens Forum). The aim of the memorandum was to create a regional energy market in SEE which would eventually be integrated into the EC energy market (Karova 2009). The Memorandum, however, has to be seen in a broader context.

In 1999, the Stability Pact for South Eastern Europe was launched to support SEE countries in fostering peace, democracy, respect for human rights and economic prosperity.[43] The Stability Pact provided a framework to stimulate regional co-operation and expedite integration into European and Euro-Atlantic structures. In June 1999, the European Council reaffirmed its willingness to support the countries in the Western Balkans[44] and to take the lead in the implementation of the Stability Pact (European Council 1999). The European Council held on 19-20 June 2000 stressed its objective of

> "the fullest possible integration of the countries of the region into the political and economic mainstream of Europe through the Stabilisation and Association process, political dialogue, liberalisation of trade and cooperation in Justice and Home Affairs" (European Council 2000a).

The European Council also highlighted that all the countries concerned were "potential candidates for EU membership" (Ibid). The Southeast Europe Summit, held in Zagreb in November 2000 also confirmed the "European perspective of the countries

[43] For more information on the stability pact see http://www.stabilitypact.org/
[44] For the purpose of this chapter the terms Western Balkans and South-East Europe (SEE) are used interchangeably.

participating in the stabilisation and association process and their status as potential candidates for membership" (European Council 2000b). In order to reach these objectives, the Commission committed to launch a Community aid programme called CARDS[45] (Community Assistance for Reconstruction, Democratisation and Stabilisation) (Ibid).

It was in this framework that the first Athens Memorandum was signed. Having a clear perspective for membership in the European Union, the countries from SEE began a process of reforms in the energy sector (Karova 2009). By signing the first Athens Memorandum in 2002, nine SEE countries accepted the political obligation to adjust their legislation to the EC law in the energy sphere (Ibid, 9). The Commission and the Stability Pact acted as sponsors. Support for the Athens Process was expressed by the Council of the European Union (Council of the European Union 2003) and the European Council (European Council 2003) on several occasions. The EU-Western Balkans summit held in Thessaloniki on 19 June 2003 also confirmed its support for the Athens Process (European Council 2003). A second Memorandum was signed in December 2003, aimed at expanding the cooperation from the electricity to the gas sector (Karova 2009, 9). In the Athens Memorandum of 2003, the SEE countries also committed to replace the latter with a legally binding agreement, which thus was the Treaty establishing the Energy Community (EnCT), signed on 25 October 2005 (Ibid, 10).

6.2.2. The institutional framework of the EnCT

The Energy Community is "an international organisation dealing with energy policy" (Energy Community 2006c). The organisation was established by an international law treaty and entered into force in July 2006. When it comes to the members of the Treaty, a distinction has to be made between Parties, Observers and Participants. At present, the Parties of the Treaty are the European Union and eight Contracting Parties, notably:

[45] The CARDS programme covers in particular: reconstruction; stabilisation of the region; aid for the return of refugees and displaced persons; support for democracy, the rule of law, human and minority rights, civil society, independent media and the fight against organised crime; the development of a sustainable market-oriented economy; poverty reduction, gender equality, education and training, and environmental rehabilitation; regional, transnational, international and interregional cooperation between the recipient countries and the Union and other countries of the region (European Commission 2007b)

Albania, Bosnia and Herzegovina, Kosovo, FYR of Macedonia, Moldova, Montenegro, Serbia and Ukraine. [46] There are four Observer states: Armenia, Georgia, Norway and Turkey.[47] Finally, participant status is held by nineteen EU Member States which have a "special bond" with the EnCT (European Commission 2011f, 2). This status can be obtained by any EU Member State. As Members of the EU, participants have an obligation to comply with the *acquis communautaire*. In addition, participants may take part in all institutional meetings of the Energy Community, but they cannot vote.

The EnCT reconfirmed the institutional settings that had been established by the Athens Process. The Energy Community relies on four institutions and a Forum on Electricity, Gas, Oil and Social (Energy Community 2006a). The two decision-making institutions are the Ministerial Council and the Permanent High Level Group (PHLG). Moreover, a Regulatory Board (ECRB) and a Secretariat have been established.

The Ministerial Council[48] is composed of one representative of each Contracting Party and two representatives of the EU. The EU is represented by a Council representative who is designated by the Member State holding the Presidency of the Council,[49] and a Commission representative (see Art. 3, Decision 2006/500/EC). Non-voting representatives of each Participant may also take part in the meetings of the Ministerial Council. As the executive organ of the Energy Community, the Ministerial Council

[46] This information is updated to 1 July 2013. When the Treaty was signed in 2005 the Parties were Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Montenegro, the FYR of Macedonia, Romania, Serbia and UNMIK on behalf of Kosovo. Ukraine and Moldova joined the Energy Community in December 2009. Bulgaria and Romania joined the European Union in 2007 and their status was changed to that of Participants. The same happened with Croatia in July 2013. (See: (Energy Community 2006b) and (Energy Community 2006a)

[47] Georgia is in the process of joining the Energy Community as a full member.

[48] The *Ministerial Council* has not to be confused with the *Council of the European Union*, neither with the *European Council*. For the purpose of this chapter, the term *Ministerial Council* refers to the institution part of the Energy Community. The term *Council* will be used as to refer to the Council of the European Union, which is composed of national ministers from each EU country. The term *European Council* will be used to refer to the institution composed by Heads of State or Government of the Member States.

[49] The Decision also states that "when this Member State designates as the Council representative a representative of one of the Member States directly affected by Title III of the Energy Community Treaty, it shall do so on the basis of a rotation between those Member States" (Decision 2006/500/EC, Art. 3(1)).

has the task of providing general policy guidelines, taking measures and adopting procedural acts.

The Permanent High Level Group (PHLG) is composed of one representative of each Contracting Party and two representatives of the EU. As for the Ministerial Council, the EU is represented by a Council representative and a Commission representative. Moreover, one non-voting representative of each Participant may also take part in the meetings. The PHLG is more closely involved in the Energy Community's day-to-day work performing tasks such as preparing the work of the Ministerial Council, giving assent to technical assistance requests made by international donors, reporting to the Ministerial Council on progress made toward achievement of the objectives of the Treaty, and taking measures if so empowered by the Ministerial Council.[50]

The Secretariat is a permanent body based in Vienna. It is mainly responsible for providing administrative support to the other EnCT institutions and fora. Finally, the Energy Community Regulatory Board (ECRB) acts as coordination platform for the exchange of knowledge and the development of best practice for regulated electricity and gas markets.

6.2.3. The decision-making process

Article 3 of the EnCT establishes a "three-tier structure", also referred to as the Treaty's concentric circles (Energy Community 2006a). Each circle deals with a particular area of the purpose of the Treaty. The EnCT foresees different decision-making processes according to which the Ministerial Council, the Permanent High Level Group and the Regulatory Board shall act or take measures.

The first circle is related to Title II *the Extension of the acquis communautaire* of the EnCT. This title addresses only the Contracting Parties that have committed to implement core parts of the EU acquis communautaire. Measures are taken based on a proposal from the European Commission; the European Commission may alter or

[50] The PHLG is also responsible for adopting Procedural Acts, not involving the conferral of tasks, powers or obligations on other institutions of the Energy Community; discussing the development of the acquis communautaire described in Title II on the basis of a report that the European Commission shall submit on a regular basis.

withdraw its proposal at any time (Art. 79); each Contracting Party has one vote (Article 80) and the three institutions act by a majority of the votes cast (Art. 81).

The second circle is related to Title III *mechanism for operation of Network Energy Markets*. This title addresses not only the Contracting Parties but also seven EU Member States connected to the region, which are Austria, Bulgaria, Greece, Hungary, Italy, Romania and Slovenia. The aim of this circle is to create mechanisms for long-distance transportation of Network Energy[51], to adopt security of supply statements and to promote high levels of energy provisions to citizens. Measures are taken based on a proposal from a Party or the Secretariat (Art. 82) and require two third majority of the votes cast, including a positive vote from the EU (Art. 84).

Finally, the third circle is related to Title III *the Creation of a Single Energy Market* which addresses the Contracting Parties and the entire EU. It provides for the free movement of network energy and aims to create a single energy market through the adoption of further measures. Measures are taken from a proposal from a Party (Art. 84) and require unanimity (Art. 85).

The milestones leading to the signing of the EnCT, together with its institutional structure and decision-making process, indicate why this case is relevant and appropriate for analysis. Firstly, the EnCT has a clear external dimension, because it is a case of EU external representation on energy: the EU represents its Member States in an international organisation. More precisely, in the institutions of the Energy Community, the EU is represented by a representative of the Council and a representative of the Commission. This means that EU positions need to be drafted with the Member States before the meetings in the Energy Community take place. Accordingly, this case study allows the analysis of the decision-making process for the external representation of the EU in international organisations. Secondly, the case also satisfies the second selection criterion as it offers some useful variation across the

[51] According to the EnCT 'Network Energy' shall be understood as to include the oil sector, i.e. supply, trade, processing and transmission of crude oil and petroleum products falling within the scope of the directive 2006/67/EC and the related pipelines, storage, refineries and import/export facilities (See Energy Community 2013, 14).

independent variables and the dependent variables. The way these variables manifest themselves empirically is discussed in the next section.

6.3. Identifying the independent variables

This section determines the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) as far as the EnCT is concerned. As with previous chapters, the *preferences* of the Commission are determined first. The section then turns to the *preferences* of the Member States. Finally, the former are compared to the latter. In contrast to previous chapters however, this case study suggests that the *preferences* of the Commission and those of the Member States are homogeneous. The *interests* these *preferences* are supposed to serve however, are different. Particular attention will therefore be devoted to the *interests*.

6.3.1. European Commission. Looking for a "unified EU representation and EU position"

This section identifies the *preferences* of the Commission on the EnCT. As mentioned earlier (section 6.2.), the Commission showed its commitment to a common energy market with the Western Balkans since the Athens Memoranda were signed in 2002. In 2003, the Commission stated its endeavour to "come forward with proposal for extending the internal energy market to the region as a whole [Western Balkans]" (European Commission 2003a, 6). Along the same lines, through its *Communication on the development of energy policy for the enlarged European Union, its neighbours and partner countries*, the Commission stated that it had brought forward proposals for the creation of a regional electricity market in South East Europe (SEE) and that a similar gas plan would also be presented in the future (European Commission 2003b, 2). In its Proposal for a Council Decision on the signing of the Energy Community Treaty (COM (2005) 435 final), the Commission stated that the "Treaty creates an internal energy market between the European Community and the non-EU countries of the region". Moreover, the EnCT "enables the setting up of a regulatory framework for the EU countries of the region. It provides for the implementation of the relevant acquis communautaire on energy environment, competition and renewables for the non-EU countries of the region" (Ibid). Official documents therefore suggest that the

Commission had a preference for a an internal energy market between the EU and SEE countries, setting up a regulatory framework to provide for the implementation of the EU acquis on energy.

Interview data is also useful for identifying the Commission's *preferences* on the EnCT. According to an official working in the Commission who followed the process closely, the Treaty was conceived in a "pre-accession perspective" (Interview No 1) which meant that the point of reference for the establishment of rules and mechanisms was EU legislation (Ibid). This pre-accession perspective was also confirmed by an official working within DG Enlargement who stated that the latter "subcontracts work to the Energy Community" (Interview No 13).[52] According to this interviewee, between the end of the 1990s and the beginning of the 2000s, it became clear that the energy system of the Balkan countries, which had been integrated before the war, had to be reconstructed and SEE countries had to be "recomposed as regional market" (Ibid). In that context, the Commission wanted to promote a regulatory framework in the Western Balkans which was in line with EU legislation. The latter was supposed to help the Commission in reaching two objectives. In the short term, a common regulatory framework with the SEE would have facilitated relationship between the EU and its neighbours. In the long-term, it would have facilitated the accession of those countries to the EU (accession requires huge efforts for candidate countries and several years of alignment to the EU acquis). Beginning that alignment beforehand therefore, would be convenient for both the Commission and the candidate countries (Interview No 4).

Secondly, interview data suggests that the Commission looked at the EnCT as a tool for a unified EC/EU representation and still does. As stated by Karova (2009, 14), "it seems that by enlarging the European internal energy market to SEE countries, the Commission tries also to increase the potential bargaining power of the EU vis-à-vis its external energy partners." An official working with DG Energy stated that the EnCT gave a "unified EU representation and EU position" (Interview No 1) for two main reasons. The first one is that only the EU as a whole is party of the EnCT, and not the

[52] DG Enlargement is not considered as an actor for the purpose of this research but as a source of information.

Member States; this gave the Commission direct power. The second reason was expressed as follows:

> "[The EnCT] mainly deals with EU legislation. The question of competence is extremely clear: if we are discussing the implementation of the EU Renewable Energy Directive in this or that Energy Community instance, we do not need to have any mandate from the Council because we have the mandate directly from our EU Treaty that the European Commission ensures the external representation of the EU except on cases of Common Foreign and Security Policy (CFSP) […]" (Ibid).

Along the same lines, the Commission also continues to see the EnCT as an opportunity to play a leading role in the region. As stated by an official working within DG Energy:

> "[…] because we [DG Energy] are not, of course, the only ones to come and support reforms in these countries [SEE], it is important that the Energy Community is the single reference when you have the World Bank coming in and saying "look I want to support […] energy efficiency". It is very important that it is energy efficiency as we understand it, based on EU legislation" (Ibid).

Official documents and data interviews seem to suggest that the Commission had a *preference* for a common energy market with SEE countries. More specifically, the Commission had a *preference* for extending the EU energy acquis to those countries adopting a common regulatory framework. As indicated so far, there seemed to be three main reasons underpinning the *preferences* of the Commission. Firstly, the extension of the EU internal energy market to the SEE countries was meant to facilitate the integration of those countries that were expected to seek accession to the EU. Having those countries implementing EU legislation on energy before accession was intended to contribute to their effective integration in the EU internal energy market. Secondly, the EnCT was an opportunity for the Commission to exercise unified external representation because the EC/EU, represented by the Commission (and not the Member States), is Party to the Treaty. Additionally, the content of the EnCT is EU legislation, which is a competence of the Commission. Having a unified representation and position would allow the Commission to reach its objectives in the external dimension of the EU internal energy market: extending the EU energy law to the SEE. Both the extension of the acquis to the SEE countries and the unified external

representation are meant to serve the Commission's *interest* for competence-maximization. For the Commission, the EnCT was an opportunity to increase its competence in the external dimension of the EU internal energy market. This is because the EnCT would give the Commission not only the opportunity to represent the EC/EU in international fora but also the opportunity to play a role in the region and export the EU *acquis* on energy.

To summarise therefore, official documents and interview data suggest that the Commission had a *preference* for *an internal energy market between the EU and SEE countries, setting up a regulatory framework providing for the implementation of the EU acquis on energy*. This preference was meant to serve the *interest* for competence-maximization.

6.3.2. *Preference* alignment among the principals (IV1): looking for a common market in energy with SEE

Data does not seem to indicate any heterogeneity of *preferences* among the principals. As will be analysed in more depth in the next section on process- tracing (6.4.), the EnCT seems to be an initiative of the Commission to which Member States granted their support. Official documents, secondary data and interview data do not seem to reveal any strong heterogeneity of *preferences* existing among the Member States. Data suggests that it is sensible to argue that the *preferences* among the principals can be defined as homogenous, as all Member States would equally benefit from the SEE implementing the EU energy acquis. More precisely, having the SEE countries implementing EU legislation on energy would have allowed a common regulatory framework for cooperation in the energy sector. This kind of scenario would have benefitted Member States by opening opportunities of trade and cooperation with those countries adopting regulatory frameworks provided by EU law. In addition, the EnCT would not have challenged Member States' national energy polices because the Treaty would only have extended existing EU legislation to the SEE countries. This suggests that Member States' *preference for a common market in energy with SEE* was in line with, or at least not against, their *interest* for maintaining control over energy policy.

Interview data emphasises that the *preference* for the EnCT was shared by small as well as large Member States and so was by countries more dependent as well as less dependent on external energy sources. As stated by an interviewee of a country not heavily-dependent on energy coming from abroad:

> "in general, we support the [Energy] Community, we support the Commission approach, but we don't have a very harsh position in this I think, the Commission is doing well […] we follow most time the Commission line, we don't have very strong position" (Interview No 12).

Similarly, a representative of a large Member State argued that the EnCT is welcomed as a way to "help […] neighbouring countries to implement the acquis so to get ready for the accession" (Interview No 28).

In summary therefore, data suggests that Member States had homogeneous *preferences* for a common energy market with SEE countries. That *preference* was expected to serve their *interest* for control over energy policy. Neither the official EU documents nor the media suggest any significant divergence among Member State as far as the EnCT is concerned. For the purpose of this chapter then, the *preference* alignment among the Member States is defined as homogeneous.

6.3.3. *Preference* alignment between the principals and the agent (IV2)

This section identifies the *preference* alignment between the principals and the agent as homogeneous: the Member States and the Commission both had a *preference* for a common energy market with the SEE countries. The *interest* underpinning these *preferences* however, was different. On the one hand, the Member States wanted a common regulatory framework under the EnCT for the sake of their own national energy policies in order to increase the security of energy supply. On the other hand, the Commission saw in the Treaty the opportunity to maximize its competences through playing a role in preparing SEE countries for accession and ensuring a unified external representation. As a result, the Commission was the main driving force for

the Energy Community, while the Member States simply endorsed the initiative. This factor will be explained in the next section on process tracing (6.4).

It is therefore reasonable to look at Member States' *preferences* as the endorsement of something proposed by the Commission: a common energy market with SEE countries. Why did the Member States support the EnCT? According to an official working in DG Energy, "the Energy Community was supported by Member States because it did not imply any negative implication on their own energy choices – the nuclear – and on their major companies. As long as you do not touch the nuclear and the major companies there is always room for cooperation" (Interview No 4).

The positive rationale behind Member States' support is that the EnCT was expected to guarantee the security of supply. As stated by the President-in-Office of the Council at that time, Mr Hans Winkler, during the debate on the EnCT in the European Parliament, the Council considers the EnCT as an important instrument for "security of the electricity and gas supply to the European Community" (European Parliament 2006b). Providing more guarantees of security of supply, Member States aimed to serve their national energy policies.

6.4. Tracing the process towards the EnCT and observing the Commission's behaviour in the EnCT

This section analyses two main events related to the EnCT. The first is the signing of the EnCT and the related process of the negotiation of the Treaty itself between the Commission and the SEE countries. The second concerns the conclusion of the Treaty, which is the process through which the EnCT is approved on behalf of the EC/EU and the rules on how an EC/EU position is to be taken in the institutions created by the EnCT are established. More precisely, this section looks at how the homogeneity of *preferences* among the principals (IV1) and the homogeneity of *preferences* between the principals and the agent (IV2) affected the Commission behaviour.

This section tests two hypotheses developed earlier in this thesis (3.5.): *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H1) and *when the preferences between*

the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals (H4). This case study therefore does not expect the Commission to deviate from the *preferences* of the Member States because the *preferences* among the principals are homogeneous and so are the *preferences* between the principals and the agent.

This section is structured as follows: a first sub-section looks at the Commission as a negotiator of the EnCT, while a second-subsection looks at the Commission as the actual external representative of the EC/EU in the institutions created by the EnCT.

6.4.1. The Commission as negotiator

The mandate to negotiate the EnCT

The Council Decision of 17 May 2004 gave the Commission the mandate to negotiate a treaty establishing an Energy Community with the SEE countries (Albania, Bulgaria, Bosnia and Herzegovina, Croatia, Macedonia, Montenegro, Romania, Serbia, Turkey, and Kosovo).

A Council official described this mandate as "more open" than others (Interview No 17). This was because the Energy Community wanted to provide a vehicle for a regular implementation of the energy legislative framework in SEE countries. The mandate therefore had to be open in order that any development in the EC/EU energy acquis could be implemented in SEE countries (Ibid). Interview data suggests that both the Commission and the Member States saw the EnCT as a constantly developing tool intended to expand the EU energy acquis to SEE countries. More precisely, the EnCT has been described by a Council official as having an "evolving scope" (Ibid) and by a Commission official as a "living instrument" (Interview No 1). This explains why the EnCT is mainly focused on procedural elements such as institutions and dispute settlements, rather than on substance (Interview No 17).

Interview data collected at the Council is particularly useful in understanding the negotiation process of the EnCT. According to a Council official "it went reasonably well in terms of reporting and allowing Member States to follow" (Interview No 17). This piece of data seems to suggest that the negotiation process developed without any major conflicting situation arising between the Commission and the Member States.

None of data collected from various sources suggests that any conflictual situations existed between these actors during the negotiations of the EnCT. The absence of conflict during the negotiations on the EnCT might be explained by the circumstance that the Member States and the Commission had seemingly homogeneous *preferences* for a common energy market with SEE countries, and that they were both genuinely interested in realising this policy-choice, even if they intended to serve different *interests*. This chapter then provides some evidence for the hypothesis according to which the Commission is less likely to try to deviate from the *preferences* of the Member States (H4). This point will be revisited in the conclusion of this chapter.

During the negotiation process, one of the "major concerns" of the Member States was to find a balance between controlling the Commission and guaranteeing the flexibility of the institutional framework of the EnCT (Ibid). Member States wanted to have some control over the institutions that were to be established by the EnCT and the mechanisms that would allow the EnCT to evolve (i.e. future legislation). This control, however, had to be balanced with the necessity of having flexible institutions. As was made clear by the aforementioned Council official:

> "the major concern of Member States […] was to make sure that there is a balance between the Commission and the role of control of the Member States […] and the difficulty was to achieve a sort of good balance between this sort of control but at the same time institutions that are flexible enough so that whatever something new has to be introduced, presented to those countries, the Commission could do it in reasonably flexible way without having, for each and every dot, comma, to consult Member States" (Interview No 17)

The need for a balance between delegation and control is one of the core topics of the PA literature. Principals need to give some discretion to the agent to assure the agent an optimal bargaining power. In the case of the negotiation of the EnCT, the Commission was given rather "open" mandate in order to sign the EnCT, i.e. they were given a mandate to negotiate the Treaty with the SEE countries itself. PA literature also indicates however that discretion has to be balanced to limit the *preference* and information advantages of the agent (Tallberg 2002). This point becomes clear when looking at the Decision for the conclusion of the EnCT by the European Community. This Decision established the rules which the Commission had to respect in its role as

external representative in the institutions created by the EnCT. The Decision is analysed in depth in the next subsection.

The Decision for the conclusion of the EnCT

In September 2005, the Commission issued a two-fold proposal: one for a Decision on the signing and one for a Decision on the conclusion of the EnCT (European Commission 2005). Two months after the EnCT was signed, the Council adopted joint guidelines proposing several amendments to the Commission proposal on the conclusion of the Treaty. The amendments concerned the rules for the position to be taken by the EC/EU in the institutions created by the EnCT. All the amendments were integrated in the final Decision 2006/500/EC (Council of the European Union 2005a). For the sake of clarity therefore, this section offers a simplified overview of the most significant amendments. Overall, three procedural amendments and some substance amendments are presented in this subsection and analysed in a principal-agent perspective. At the end of this subsection, table 6.1 summarises the main differences between the Commission proposal and the final Council Decision.

A first important amendment concerned the position to be taken by the European Community within the institutions of the EnCT (Article 4). While the Commission proposal stated that those decisions were to be adopted by the Council by "qualified majority voting on a proposal from the Commission", the amended version stated that they "shall be adopted by the Council acting in accordance with the relevant provisions of the Treaty establishing the European Community", meaning unanimity or qualified majority voting.[53] The decision under Article IV refers, in turn, to Title III and IV of the EnCT and not to Title II dealing with the *extension of the acquis communautaire* which concerns EU legislation. EU legislation is a competence of the Commission. Therefore, decisions taken in this domain do not need to be adopted by the Council.

[53] The decisions to which Art. 4 refers were those "in Article 76 of the Energy Community Treaty pursuant to Articles 82, 84, 91, 92, 96, and 100". Article 76 establishes general provisions for the Decision-making progress. Articles 82 and 84 deal with how measures are to be taken under Title III (Mechanism for the operation of network energy markets) and IV (Creation of a single energy market) respectively. Articles 91, 92 and 96 EnCT deal with the existence of breaches. Article 100 deals with Revision and Accession to the EnCT.

The Council also added a paragraph to this Article stating that "Without prejudice to the relevant procedures of the Treaty establishing the European Community, before the Commission tables a proposal for a measure under Title III of the Energy Community Treaty, it shall duly consult the Member States directly affected by the proposal" (Art. 4(4)). As mentioned before, Title III deals with a *mechanism for operation of network energy markets* and, as far as the European Community is concerned, has a geographical scope limited to some countries neighbouring the Energy Community countries.

By modifying the legislative proposal with the amendments above, the Member States wanted to ensure control over the process of the formulation of the positions to be taken by the European Community within the EnCT institutions. Thus, the Council wanted to have a say on the formulation of those positions and not simply adopt them by "qualified majority voting on a proposal from the Commission" (COM (2005) 435 final).

A second important amendment concerns Article 5 of the proposal. The Council deleted the provision in Art 5(3) ensuring the consultation of the European Parliament before adopting the position of the European Community, the so-called "consultation procedure". During the debate in Parliament, the President-in-Office of the Council at that time, Mr Hans Winkler, justified this choice by arguing that the Commission proposal had envisaged consultation of the European Parliament only in case of decisions on the extension of the EnCT to other energy products and carriers, or other essential network infrastructures (Article 100(iii)). According to the Commission proposal, the Commission would present the Council with a draft relating to the establishment of a Community position on this type of amendment of the EnCT, and the Council would then have to consult Parliament on this position. The Council, however, did not accept the proposal, as such a procedure is not provided for in the EC Treaty (European Parliament 2006b). This point suggests that the Council did not want to be bound by the European Parliament on the establishment of a Community position. For this reason, the Council recalled the existing EU legislation, arguing that the role the EP was claiming was not envisaged.

A third procedural amendment was in Article 6, where a paragraph was added stating that "within the Ministerial Council, the position of the European Community shall be expressed by the representative of the Council for decisions taken under Article 92 of the Energy Community Treaty." The reason for this amendment is that Article 92 deals with Dispute Settlement Procedure which is a politically sensitive topic. It is therefore reasonable to think that the Council wanted to maintain control and take the floor in the EnCT on this particular issue.

In a PA perspective, the three amendments above can be seen as an *ex-ante* control mechanism through which the Council set boundaries for the Commission to represent the EC/EU in the EnCT. The Council therefore set the rules before the game – that is, the representation of the EC/EU in the EnCT – began.

There were additional amendments which were not strictly related to the decision-making process. Firstly, the Council attached Annex IV to the signed Treaty text, defining the contribution of each party to the budget of the EnCT (European Parliament 2006a). Secondly, the Council introduced an amendment, Article 4(3), ensuring that in the event of special circumstances, decisions falling under Chapter IV of Title IV of the EnCT – *Mutual Assistance in the Event of Disruption* - may go beyond the acquis communautaire. This last clause is important because mutual assistance was not fully covered by the existing acquis. Therefore, flexibility had to be introduced, and this was done by giving the Council the opportunity to decide on a case-by-case basis by qualified majority voting, whether or not the specific circumstances justifying mutual assistance have been met (European Parliament 2006a).

Finally, the Council introduced an article providing that "three years after the entry into force […], the Commission shall submit to the European Parliament and to the Council a report on the experiences gained from the implementation of this Decision, accompanied, if appropriate, by a proposal for further measures" (Council of the European Union 2005b). In a PA perspective, Article 7 can be seen as an *ex post* control mechanism falling into the category of what McCubbins and Schwartz (1984) call "police-patrol oversight." This comprises active monitoring of the agent's

behaviour by the principals "with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations" (Pollack 1997).

In summary, the proposal issued by the Commission foresaw some important competences for the agent. The Council amended the proposal in a substantial way to maintain control over the EnCT, particularly on the formulation of the EC/EU position in the EnCT institutions. The analysis of this first phase then seems to suggest that the Commission tried to satisfy its interest for competence-maximization while the Member States tried to satisfy their interest for control over energy policy, as expected in the PA literature. Ultimately however, the Commission's proposal did not challenge the substance of the EnCT: the policy choice for a "common energy market with SEE countries". By the same token, this *preference* was not questioned by the Council either. The Council used the *ex-ante* control mechanism at its disposal to make sure it could not lose control of the situation in the EnCT institutions. As far as this phase is concerned therefore, the Commission's behaviour seems to be one of "responsive autonomy" (see 3.3.) because, despite the Commission's attempt to satisfy its interest for competence-maximization, it was still responsive to Member States' demand for a "common energy market with SEE countries."

Table 6.1: Comparison between Commission proposal COM (2005) 435 final and Council amendments

Commission Proposal for a Council Decision on the conclusion by the European Community of the Energy Community Treaty (COM (2005) 435 final)	Council's amendments on the Commission proposal incorporated in the Decision 2006/500/EC
	(8) **In special circumstances such as the event of disruption of network energy**, security of supply needs to be ensured in the Energy Community. The mutual assistance mechanism of the Energy Community Treaty can help to mitigate the consequences of the disruption, in particular in the territories of the Contracting Parties within the meaning of that Treaty.
(14) It is appropriate to lay down a specific procedure for the application of the internal revision clause provided for in Article 101(iii) of the Treaty	*(15)* It is appropriate to lay down a specific procedure for the application of the internal revision clause provided for **in Article 100(i), (iii) and (iv) of the Energy Community Treaty**
Art. 3 (1) The European Community shall be re presented in the Ministerial Council and the Permanent High Level Group set up under the Treaty by: (a) a representative of the Council of the European Union designated by the Member State holding the Presidency of the Council of the European Union	*Art. 3(1)* The European Community shall be represented in the Ministerial Council and the Permanent High Level Group set up under the Energy Community Treaty by: (a) a Council representative designated by the Member State holding the Presidency of the Council; **when this Member State designates as the Council representative a representative of one of the Member States directly affected by Title III of the Energy Community Treaty, it shall do so on the basis of a rotation between those Member States**
Art. 4(1) The position to be taken by the European Community within the Ministerial Council, the Permanent High Level Group and the Regulatory Board for decisions as defined in Article 76 second paragraph of the Treaty adopted by the Energy Community pursuant to Articles 82, 84, 91, 92, 96, and 100 of	*Art. 4(1)* The position to be taken by the European Community within the Ministerial Council, the Permanent High-Level Group and the Regulatory Board for decisions as referred to in Article 76 of the Energy Community Treaty pursuant to Articles 82, 84, 91, 92, 96, and 100 thereof, **having legal effect**, **shall be adopted by the Council acting in**

Commission Proposal for a Council Decision on the conclusion by the European Community of the Energy Community Treaty (COM (2005) 435 final)	Council's amendments on the Commission proposal incorporated in the Decision 2006/500/EC
the Treaty, **affecting the European Community**, **shall be adopted by the Council acting by a qualified majority on a proposal from the Commission.**	**accordance with the relevant provisions of the Treaty establishing the European Community.**
	Art. 4(3) For decisions of the Energy Community falling under Title IV of the Energy Community Treaty, and applicable to the territories to which the Treaty establishing the European Community applies under the conditions laid down therein, positions adopted under paragraph 1 shall not go beyond the acquis communautaire. However, positions adopted under paragraph 1 may go beyond the acquis communautaire with respect to Chapter IV of that Title in the event of special circumstances.
	Art. 4(4) Without prejudice to the relevant procedures of the Treaty establishing the European Community, before the Commission tables a proposal for a measure under Title III of the Energy Community Treaty, it shall duly consult the Member States directly affected by the proposal.
Art. 4(4) The positions of the European Community to be taken within the institutions of the Energy Community shall ensure that the Energy Community does not take any measure **affecting the European Community** that conflicts with any part of the Acquis communautaire, creates any discrimination between Member States or affects the competence of an EU Member State as regard the determination of the conditions for exploiting its energy resources, the choice between energy resources and the general structure of its energy supply.	*Art. 4(6)* The positions of the European Community to be taken within the institutions of the Energy Community shall ensure that the Energy Community does not take any measure **having legal effect** that: - conflicts with any part of the acquis communautaire, - creates any discrimination between Member States, or - affects the competence and rights of an EU Member State as regards the determination of the conditions for exploiting its energy resources, the choice between energy resources and

Commission Proposal for a Council Decision on the conclusion by the European Community of the Energy Community Treaty (COM (2005) 435 final)	Council's amendments on the Commission proposal incorporated in the Decision 2006/500/EC
	the general structure of its energy supply.
Art. 5(1) The procedure set out in the two paragraphs below shall apply before a position can be taken by the European Community pursuant to Article 4(1) above for decisions adopted by the Energy Community pursuant to **Article 100(iii)** of the Treaty.	*Art. 5(1)* The procedure set out in paragraph 2 shall apply before a position can be taken by the European Community pursuant to Article 4(1) for decisions adopted by the Energy Community pursuant **to Article 100(i), (iii) and (iv)** of the Energy Community Treaty.
Art 5(2) Upon recommendation by the Commission, the Council, **acting by a qualified majority**, shall authorise the Commission to deliberate within the institutions of the Energy Community. The Commission shall conduct these deliberations in consultation with a special committee appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it	*Art 5(2)* Upon recommendation by the Commission, the Council, **acting in accordance with the relevant provisions of the Treaty establishing the European Community**, shall authorise the Commission to deliberate within the institutions of the Energy Community. The Commission shall conduct these deliberations in consultation with a special committee appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.
Art. 5(3) The Council shall consult the European Parliament before adopting the position of the European Community.	**Deleted**
	Art. 6(2) Within the Ministerial Council, the position of the European Community shall be expressed by the representative of the Council for decisions taken under Article 92 of the Energy Community Treaty.
	Art. 7 Three years after the entry into force of this Decision, the Commission shall submit to the European Parliament and to the Council a report on the experiences gained from the implementation of this Decision, accompanied, if appropriate, by a proposal for further measures

6.4.2. The Commission as external representative of the Member States in the institutions of the EnCT

The previous section has shown how the Council established several *ex-ante* control mechanisms to constrain the Commission in its role as EU external representative in the institutions created by the EnCT. This section in turn looks at the current role of the Commission in these institutions. The section builds mainly on interview data collected from the Commission and selected Permanent Representations.

Interview data confirms that the Commission is the EU external representative at the EnCT institutions. More precisely, a Commissioner represents the EU at the Ministerial Council, and a Deputy Director General represents the EU at the Permanent High Level Group. In both instances, only those two people take the floor and speak for the EU. This point is particularly important as the EU, represented by the Commission, and not the Member States, is Party to the EnCT. It is therefore the Commission and not the Member States that takes the floor and votes in the EnCT.

Interview data suggests that the EnCT is a success story of unified EU representation in international organisations. According to an official of a Permanent Representation, expanding the internal energy market outside the EU is "the only thing" that the Commission can do in their external policy, but that it is also "the max they can do" (Interview No 10). This was also confirmed by another official working in another Permanent Representation, who stated that it "is the expansion of the internal market" and is "the most efficient" the Commission can be because "it is legal, it has nothing to do with the private sector and that is the capacity that the Commission has by the Treaty" (Interview No 11).

What the interview data above seems to suggest is that the Commission has a particularly powerful position in the EnCT as it represents the Member States. The domain in which the Commission can take decisions at the EnCT however, is rather limited, as it only concerns existing EU legislation. This is the reason why the Commission is particularly "efficient" in the EnCT: because it cannot create new binding legislation for Member States. This fact reduces the opportunities for the Commission to deviate from Member States' *preferences*. Although it is correct to

argue that the Commission is a powerful external representative of the EU in the EnCT, as the EU, represented by the Commission, is the only Party to the Treaty (and Member States are not), it also has to be acknowledged that the Commission can act without the consent of the Member States only on existing EU legislation.

More precisely, as far as the decision-making process is concerned, interview data seems to confirm that the level of engagement of the Commission and the Member States in the EnCT institutions depends on the nature of the decision to be taken. As described earlier in this chapter (6.2.3.), there are two types of decision to be taken: the ones falling entirely under the competence of the Commission and the ones which also require involvement of Member States. As far as the first group is concerned, interview data suggests that the Commission experiences "a certain degree of autonomy" because it has a role defined in the Treaty itself [the EnCT] as well as a role of external representation that is defined in the EU Treaty (Interview No 1). In other words, when the decision to be taken falls within the *acquis communautaire on energy, environment, competition and renewables*, that is, the first of the three circles in which the Treaty is structured (Title II of the Treaty), the decision is taken "on a proposal from the European Commission". In addition, the Commission may "alter or withdraw its proposal at any time" (EnCT, Art. 79).

By contrast, when the decision to be taken in the EnCT has legal implications and it is not covered by existing EU legislation, an EU position needs to be defined and Member States are asked to take a position. Examples include programmes to be taken for the EnCT, the appointment of the director, decisions about the incorporation of new elements of the acquis into the scope of the Treaty, possible derogations for the countries, the budget etc. In these cases the formal decision-making process applies, which means that the Commission drafts a position with the Energy Working Party in the Council which then goes to the Coreper and is then expressed as an EU formal position at the EnCT (Interview No 1).

How can this case help to answer the research question of this thesis? It has been argued earlier in this chapter that the *preferences* of the principals were homogenous (IV1) and homogenous with those of the agent (IV2). These *preferences*, however,

were deemed to serve different *interests* for the agent and the principals, namely competence-maximization for the Commission and control over energy policy for the Member States. Milner's (1997) distinction between *preferences* and *interests*, therefore, allows consideration of both the policy choices taken by the actors and the fundamental goals which are deemed to drive actors' choices. The PAM seemed to provide sufficient explanatory power on this case. Firstly, the divergence of *interests* between the Commission and the Member States offers room for a PA analysis. Secondly, the way the Council and the Commission behaved on the EnCT file suggests that, while the agent was trying to grant itself as much discretion as possible, the principals used both *ex ante* and *ex post* control mechanisms to constrain the agent. Ultimately, because both the actors had a *preference* for a common energy market with SEE, the Commission did not actually deviate from the *preferences* of the Member States. Another possible reason for this behaviour might be that during the negotiations of the Treaty, Member States made extensive use of control mechanisms and constrained the Commission by establishing the procedures for the formation of positions and adoption of measures within the EnCT institutions. This point will be reviewed in the conclusion (chapter 8) of this thesis.

6.5. Conclusion

This chapter analysed the role of the Commission as the external representative in the EnCT. The case has suggested that the Member States had *homogenous* preferences for *a common market in energy with SEE*. The case has then tested whether *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H1). The case has also identified that the preferences of the Member States were homogeneous with those of the Commission (IV2) and has therefore enabled the testing of whether *when the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H4). The chapter has also highlighted that, despite sharing the same *preferences*, the Commission and the Member States aimed to satisfy different *interests*. The former saw in the EnCT a tool to expand its competences – through effective EU external representation and being a

point of reference for energy relations with SEE countries. The Member States, on the other hand, supported the EnCT for the sake of their national energy polices.

This chapter has provided some empirical evidence to support the hypotheses above, suggesting that the EnCT the Commission did not deviate from the preferences of the Member States. This might be the case because if the principals and the agent share the same *preferences,* there would be no reason for the agent to diverge from the *preferences* of the principals. On the EnCT, both the Commission and the Member States had a *preference* for a common energy market with SEE countries and they both aimed to implement this policy choice. Hence, the case has shown that the Commission did not try to diverge from the *preference* for a common energy market with SEE countries. The chapter has also stressed, however, that the Commission tried to get the most out of the window of opportunity offered by the EnCT as it tried to affirm itself as the only legitimate representative of the EU on the acquis on energy, environment and competition. Member States, on the other hand, used all the possible control mechanisms to constrain the Commission within the EnCT institutions. This kind of behaviour then seems to be one of "responsive autonomy" as defined in section 3.3. of this thesis.

The analysis of this case suffers of some limitations which further research can solve. Firstly, the EnCT was signed in 2005 and there is a long time-span to be covered in the analysis. The Energy Community can be analysed from various aspects: the delegation from the Council to the Commission to negotiate the Treaty and the post-delegation period, i.e. what happened in the Energy Community since the Treaty came into force. During the interview process interviewees moved from one aspect to the other. This chapter tried to focus on both Decision 2006/500/EC and on the Energy Community as it is today. The Energy Community was defined by one Commission official as a "living instrument" (Interview 1) and as an "evolving instrument" by a Council official (Interview 17). The evolving nature of the EnCT therefore has to be taken into account when the Energy Community is analysed.

Another possible limitation of this chapter is the discrepancy emerging between the official documents and interview data on the role of the Commission in the EnCT. On

the one hand, interviewees from the Commission emphasized the role of the representatives of the Commission as the only ones speaking for the EU in the Ministerial Council and the PHLG of the EnCT. Official documents, however, in particular Decision 2006/500/EC, still recognise a role for the representative of the Council in the EnCT institutions. This Decision however only refers to representatives of the Council and does not mention anything about who is supposed to take the floor for the EU in the EnCT institutions; nor does the Decision mention anything about the voting procedures. From the internal rules of procedure of the Ministerial Council we can learn that "As provided in Article 80 of the Treaty, each Party shall have one vote." It could therefore be assumed that, while both the Commission and the Council can have a representative in the EnCT institutions, only one of them can vote for the EU and – according to Interviewee No 1 – it is then the Commission that takes the floor.

Despite the limitations above, this case seems to contribute to the understanding of the relations between the Commission and the Member States as far as the external dimension of energy policy is concerned. The process leading to Decision 2006/500/EC offers a good overview of the dynamics that occurred between the two actors and offers some insights on the reason why the Commission did not deviate from Member States *preferences*. The analysis of initiatives aiming at the creation of an integrated energy market with third countries continues in the next chapter which turns to the Energy Charter Treaty (ECT). The ECT was signed in 1994 and establishes a multilateral legal framework for cross-border energy co-operation and also deals with the promotion and protection of investment, trade and transit of energy goods.

Chapter 7 The Energy Charter Treaty (ECT)

7.1. Introduction

This chapter is a case study on the Energy Charter Treaty (hereinafter *ECT* or *the Treaty*). The ECT establishes a multilateral legal framework for cross-border energy co-operation and deals with the promotion and protection of investment, trade and transit of energy goods (Energy Charter Treaty Secretariat 2002; Cameron 2002). Similar to the previous chapter on the Energy Community Treaty (EnCT), this chapter looks at an initiative aiming at the creation of an integrated energy market with third countries (see 3.2.). The individual Member States and the EU[54] are signatories of the Treaty and parties of the Energy Charter Conference which is the decision-making and governing body established by the ECT. Therefore, both the Commission and each individual EU Member State can take the floor in the Energy Charter Conference.

This case is expected to contribute to the research question of this thesis by looking at the role of the Commission in the ECT. The chapter defines the *preference* alignment among the principals as *heterogeneous* (IV1) because the Member States had different *preferences* on the ECT. As in chapter 5, an *empirically informed small subset of Member States sharing homogenous preferences* is defined to compare the *preferences* of the principals to those of the agent. The *preference* alignment between the principals

[54] The Energy Charter Treaty was signed in 1994 – when the European Community (EC) had legal personality - and is still ongoing today. Since 2009, however, the European Union (EU) has gained the status of legal personality. For the purpose of this chapter then, both the acronyms EC and EU will be used. The expression EC/EU is also used.

and the agent is defined as *homogeneous* because the actors had similar *preferences* (IV2).

Consequently, this case study tests the following hypotheses: *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals (H1)* and *when the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals (H4).* These two hypotheses predict different outcomes. The chapter, therefore, aims to assess which one of the two independent variables has a major effect on the dependent variable or, in other words, which of the outcomes above is more likely.

7.2. Context

This section provides some background information about the ECT in order to better understand the context in which the PA relationship between the Commission and the Member States is analysed here. Firstly, the main steps leading to the signature of the ECT are presented in the sub-section below. A second sub-section looks at the institutional framework of the ECT and the rules for the adoption of the decisions within the institutions created by the Treaty.

7.2.1. Milestones

The ECT is the result of a process that began with a proposal by the Dutch Prime Minister Ruud Lubbers for a pan-European energy community at a June 1990 meeting of European Union Heads of State and Government in Dublin (Doré 1995, 1). When the Union of Soviet Socialist Republics (USSR) started to collapse, Lubbers proposed an Energy Charter as an instrument for economic integration of Western and Eastern Europe. The Charter aimed to ensure the free circulation of energy in Europe after the decline of the Soviet system (Furfari 2012, 389–390). The Charter also aimed to facilitate access to the energy resources of the former USSR and ensure the transit of energy through the countries of the old Soviet bloc (Ibid). As stressed by Matlary (1997), Russia and Central Europe were facing a critical situation at that time. The Gulf crisis caused oil price volatility and a concomitant Russian demand for energy payments in hard currency. Not only was the Russian energy production system in a

state of crisis, but the ability to pay for energy in Central Europe was also in a state of emergency (Ibid, 74).

The President of the Commission, Jacques Delors, took Lubbers' proposal into consideration and developed the Commission's ideas on the possible content of a European Energy Charter (Doré and De Bauw 1995). That idea was further discussed at the summit of the Conference on Security and Cooperation in Europe (CSCE) on 21 November 1990. High-level talks on the proposal for the energy charter were also held between Delors, Commissioners Andriessen and Cardoso e Cunha, together with the Russian Deputy Prime Minister (Matlary 1997, 73–4). The high-level group concluded that the EC would commit to assisting Russia to produce and transport natural gas, and in return the EC would receive a stable supply. Thus, oil price volatility caused by the Gulf crisis, together with Russian demand for energy payments in hard currency, intensified the work of the EC towards a grand strategy. In December 1990, the European Council gave the Commission a mandate to progress with the charter and adopt a draft communication outlining its contents. Following that, the Council decided to convene an international conference in 1991 with the aim of promoting some form of long-term energy cooperation.

The Charter reflected the concept of the internal energy market – that is, to establish binding commercial rules for the transportation and sale of energy. Rules concerning exploration and production in joint ventures, however, were not covered by the internal energy market but were needed in the Charter. The latter was signed in December 1991 as a political declaration. It was a concise expression of the principles that should underpin international energy cooperation (Energy Charter Secretariat 2014). In particular, the Charter was based on the following principles: development of open and efficient energy markets, creation of conditions that will stimulate the flow of private investment and the participation of private enterprises, non-discrimination among participants, respect for state sovereignty over natural resources, recognition of the importance of environmentally sound and energy-efficient policies (Energy Charter Treaty Secretariat 2002, 8). The Charter was, therefore, a type of "political commitment to co-operation in the energy sector" (Ibid); a sort of "basic agreement"

negotiated with the aim of creating a legally binding framework for the charter (Matlary 1997, 105).

Going beyond that expression of principles, the Treaty was then signed in 1994 and provided a multilateral framework for energy cooperation which was a novelty in international law (Energy Charter Secretariat 2014). The negotiations began in 1992 and were relatively quick, especially considering that "there was no previous experience with negotiations of an agreement of similar type" (Energy Charter Treaty Secretariat 2002, 8). The Treaty was then adopted by forty-nine states, including Russia (Furfari 2012, 190). The signatories also included the other major energy producers in the Eurasian continent, such as Azerbaijan and Kazakhstan, Norway, the EC as well as EU Member States, Japan and Australia (Belyi 2012, 307).

At the beginning, there was talk of making the Charter a process of the International Energy Agency (IEA) or of the Conference on Security and Cooperation in Europe (CSCE). In the end, however, the EC alone conducted the process. The Commission coordinated the policy process and at the CSCE summit in Paris in November 1991, Jacques Delors recalled that a European charter for energy was the best way to achieve East-West integration and create a confident environment for the best use of energy resources in the international community (Matlary 1997, 75). In 2002, fifty-two countries – and the EC – had signed the ECT and forty-six had completed the ratification procedures. Among those countries which did not ratify the treaty was Russia. Russian non-ratification is considered one of the biggest weaknesses of the Treaty, which, without such a big energy producer, loses a lot of its potential. As of June 2013, Russia is not the only country which has signed the Treaty but not yet ratified it. The other countries are Australia, Belarus (applies the Treaty provisionally), Iceland, and Norway.

7.2.2. Institutional framework and decision-making process

The institutional framework of the Energy Charter is composed of two main institutions: the Energy Charter Conference and the Energy Charter Secretariat. The Energy Charter Conference (hereinafter the Conference) is the main institutional body of the ECT with the political responsibility for the implementation of the Treaty itself.

The Conference is an intergovernmental organisation whose members are all the states that have signed or acceded to the Treaty (Energy Charter Treaty Secretariat 2002, 11): each contracting party is entitled to have one representative. The EU has also one representative as it is also party of the Treaty.

The Conference meets periodically at intervals determined by the Conference itself. It is not only a negotiation forum for the development of new instruments mandated under the ECT, but also an oversight body. The Conference is also in charge of the issues related to the implementation of the Treaty (i.e. progress towards ratification, request for accession, review of exceptions to national treatment, etc.). The Conference also decides on possible amendments to the Treaty and on the admission of new members (Ibid, 59-61). [55]

The Energy Charter Secretariat was established in Brussels in 1996 to serve the Conference and its Member States (Ibid). The Secretary-General is appointed by the Charter Conference. The Secretariat is responsible to the Conference, which it provides with the necessary assistance to perform its duties.

The decision-making process within the ECT is differentiated depending on the subject matter on which a vote is taken. The general rule is that decisions provided for in the Treaty shall be taken by a three-quarter majority of the Contracting Parties (CPs) present and voting at the meeting of the Charter Conference. A decision shall be valid however only if it has the support of a simple majority of the CPs. In each case, Contracting Parties shall make every effort to reach agreement by consensus (Ibid, 60-61).

Unanimity is required for political decisions of a fundamental character, such as amendments and accessions to the ECT, as well as the conclusion of association

[55] Some further functions and powers of the Energy Charter Conference are the following: carry out the duties assigned to it by the Treaty and its Protocols; keep under review and facilitate the implementation of the principles of the Charter and the provisions of the Treaty; consider and approve the annual accounts and budget of the Secretariat; encourage cooperative efforts aimed at facilitating and promoting market-oriented reforms and the modernization of energy sectors in transition economies; authorize and approve amendments to the Treaty, negotiations of accession and association agreements, and the negotiations of new Declarations and Protocols related to the Treaty; appoint the Secretary General (Energy Charter Secretariat 2002).

agreements. Unanimity is also required for changes to the Annexes of the Treaty or the approval of the Secretary General's nominations of panellists for trade disputes. Finally, qualified majority voting is required for decisions on budgetary matters, while decisions concerning amendments of the functions of the Charter Conference or the Secretariat require a three-quarter majority of the Contracting Parties (Ibid).

To summarise therefore, the ECT was signed in 1994 and established a multilateral legal framework for cross-border energy co-operation between the Member States of the EC, the EC itself, the countries of Central and Eastern Europe. The Treaty established two main bodies, the Energy Charter Conference and the Energy Charter Secretariat. In the Energy Charter Conference, which is the main institutional body of the ECT, each Contracting Party is entitled to have one representative, and the EU also has one representative, as it is party of the Treaty. It is in this context that the role of the Commission as external representative is analysed in this chapter. In the next section the two independent variables likely to affect the Commission's behaviour are identified and defined.

7.3. Identifying the independent variables

This section identifies the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) for the case of the ECT. As was described in more depth in the research design section (3.4.), *preferences* are defined as "specific policy choices" that derive from *interests* (Milner 1997, 15) and need to be identified on a case by case basis. *Interests*, instead, are "fundamental goals" which change little. For the purpose of this research, *interests* are taken as given and deduced from existing literature. In particular, the *interest* of the Commission is competence-maximization, while the *interest* of the Member States is maintaining control over energy policy. This section then defines the *preferences* of the Commission and those of the Member States with regard to the ECT.

This research expects the *preferences* among the principals (IV1) to be *heterogeneous* and the *preferences* between the principals and the agent (IV2) to be *homogenous*. From a methodological point of view, the heterogeneity of *preferences* among the principals requires a benchmark in order to be compared with those of the Commission

(see section 3.4.2.). In the next subsection therefore, a *small subset of Member States sharing homogenous preferences* is used to compare the *preferences* of the principals with those of the agent. The contribution of this analytical device is revisited in the conclusion of this thesis.

7.3.1. *Preference* alignment among the principals (IV1): a variety of preferences

Data suggests that Member States had heterogeneous *preferences* on the ECT with some of them placing more importance than others on the Treaty. The Netherlands and the UK for example, attached the most importance to the Charter ahead of the Treaty. As the context section (7.2.) highlighted, the Energy Charter was a Dutch initiative, backed and pushed forward by the European Commission (Matlary 1997; Furfari 2012; Cameron 2002; Mayer 2008). Prime Minister Ruud Lubbers first launched the idea of establishing closer economic relations with the Eastern European suppliers in June and November 1990 (Mayer 2008). This initiative was also backed by Italy and the UK at the time (Ibid). This original heterogeneity of *preferences* is very well described by Matlary (1997). France was not very positive on the Energy Charter as it feared that non-nuclear countries would delay the protocol on nuclear energy and that non-European countries would be included in the Charter. As work progressed however, France began to participate fully. The UK strongly favoured the Charter as a means of extending the liberalisation of the energy market to the whole of Europe. The UK was however, not ready to favour any "elements that could lead to a transferral of power to the EU institutions or a new supranational institution" (Matlary 1997, 89). Germany had a position very similar to that of the UK as it favoured a major role for private firms and minimal EU administration of the Charter. Italy supported the Charter from the beginning, declaring itself an "umbilical cord" between the reserves of Algeria and Central Europe.

Interview data shows that Member States still have different *preferences* on the ECT and attribute different degrees of importance to the Treaty. Based on their *preferences* on the ECT, Member States can be divided in three subgroups: 1) energy producers and traders; 2) countries that are highly dependent on energy coming from Russia and 3) Member States less dependent on energy from Russia. Firstly, energy producers and

traders, notably the UK and the Netherlands, have a *preference* for the ECT as an instrument to promote trade in energy. The UK was until recently largely self-reliant for energy, producing significant quantities of oil, gas and coal; since late 2005, the UK has been a net oil importer. According to a report of the IEA, the UK exports two-thirds of its crude oil and natural gas liquids (NGL) production, mainly to the Netherlands (36% of total exports in 2010), the United States (18%), Germany (18%) and France (9%). In turn, the UK imports crude oil from Norway (68% of total imports), Russia (8%) and Libya (6%). The UK also exports one third of its oil products, mainly to the Netherlands (21% of the total), the United States (20%), Ireland (14%) and France (6%) (IEA 2012). With regard to the Netherlands, the country is the biggest natural gas producer in the EU. According to Eurostat data, the country accounted for 43.2% of EU-28 gas production in 2012 (European Commission 2014). As stated by the Dutch Ministry of Economic Affairs (2014) during a Meeting of the Energy Charter Conference held in Kazakhstan, private sector investments play a key role in ensuring that future energy demand is met and the ECT is a tool for providing investors with rules and stability. The Netherlands also exports gas to Germany, Belgium and France (Ibid). The Netherlands and the UK therefore attach particular importance to the ECT as an instrument of investment protection.

The second sub-group includes countries that are highly dependent on energy coming from Russia, notably Eastern European countries (EEC). EEC joined the ECT in the 1990s prior to joining the EU in 2004. In the early 1990s, oil price volatility caused by the Gulf crisis and the concomitant Russian demand for energy payments in hard currency triggered the need for binding legislation for the transportation and sale of energy (Matlary 1997). Even at this time, EEC import almost if not the entirety of their gas consumption from Russia (see table 7.1 below). It seems therefore sensible to argue that the EEC attaches "the most attention" to the ECT because it concerns their regions and interactions with Russia, as stated by an official working in a Permanent Representation (Interview No 10).

Table 7.1: Eastern European Countries: Gas Imports from Russia

	Gas as % of primary fuel -2007	Gas coming from Russia (2008) * as % of total gas consumption
Bulgaria	15	99
Czech rep.	15	82
Estonia	13	100
Hungary	40	83
Latvia	29	85
Lithuania	32	96
Poland	13	58
Romania	32	31
Slovakia	28	117 (some re-export)
Slovenia	12	51

Source: (Buchan 2010b)

Finally, a last subgroup is composed of Member States less dependent on energy from Russia. This subgroup includes countries for which Russia is not the only exporter such as Austria, Belgium, Cyprus, Germany, Italy, Finland and France. The subgroup also includes countries that do not import from Russia at all such as Croatia, Denmark, Ireland, Luxembourg, Malta, Portugal, Spain and Sweden. For these countries, the ECT is not a high-priority. This attitude is well captured by an official of one of the countries listed above:

> "We used to put more emphasis on emphasis on Energy Charter Treaty. We don't have human resources. We took part in the agenda, we are in favour of the ECT but we have a limited administration. The Commission is putting a lot of effort. Poland would be more outspoken. To me it moves forward, we encourage the work of the Commission" (Interview No 18).

In order to compare the *preferences* of the Member States to those of the Commission, *an empirically informed small subset of Member States sharing homogenous preferences* is defined based on the three subgroups identified above. Interview data and secondary data suggest that the Netherlands, the UK and the EEC have a strong *preference* for the ECT. All of them see the Treaty as a tool to protect and facilitate trade and investment in the energy field. It seems therefore sensible to look at those countries as *small subset of active Member States with homogenous preferences* to be

compared with the Commission; their *preference* then can be identified as legal framework for trade and investment in energy (IV1).

In the theoretical framework of this thesis it has been argued that *preferences* are deemed to serve *interests* – fundamental goals. How can the *preferences* of the Member States serve their *interest* for maintaining control over energy policy? A legal framework for trade and investment in energy is expected to serve the economic *interests* of energy producers and traders, notably the Netherlands and the UK. Moreover, stable and binding rules for the trade and investment in energy are expected to favour the EEC that are heavily dependent on imports from Russia. These Member States then supported the ECT for the sake of their national energy polices.

In the next section the *preferences* of the Member States (IV1), defined as the *preference* of a small subset of them sharing homogeneous *preferences,* is compared with the *preference* of the Commission. In doing so, the second independent variable of this research, the *preference* alignment between the principals and the agent (IV2), is identified and defined for the specific context of the case.

7.3.2. *Preference* alignment between the principals and the agent (IV2)

This section defines the preference alignment between Member States and the Commission (IV2). The *preferences* of the principals have been operationalised using an analytical device as "legal framework for trade of and investment in energy." Analysing official documents supplemented by interviews conducted with officials working within the Commission, this section aims to identify the *preferences* of the Commission.

The Communication proposal sent to the Council for the conclusion of the ECT, provides some useful information about the Commission's *preferences* on the Treaty:

> "The Commission considers that the conclusion [of the ECT] will mark a major step in the development of **cooperation with the countries of Central and Eastern Europe and of the Commonwealth of Independent States.** On the one hand, the Treaty will provide greater **legal certainty for investors**, by giving them the benefit of national treatment, will introduce an obligation for transparent treatment of investments and will **give consumer countries supply guarantees**. At the same time the implementing procedures (Secretariat, Ministerial Conference and recognized arbitration mechanisms) guarantee control and introduce a process for **cooperation in the energy field"** (European Commission 1995, 2).

The excerpt above suggests that the Commission conceived of the ECT as a tool for cooperation in the energy field. The ECT was supposed to provide rules for trade and investment in energy, giving certainty and guarantees to investors and consumer countries. As the ECT was signed in 1995, the target countries for cooperation at the time were the Central and Eastern European countries and the countries of the Commonwealth of Independent States. The world has certainly changed profoundly since then, and more recent data needs to be analysed in order to fully grasp the *preferences* of the Commission.

In a Communication entitled *An Energy Policy for Europe*, the Commission mentioned the ECT as an instrument for the EC and its Member States to be "a key driver in the design of international agreements" (European Commission 2007d). Similarly, in a *Communication on security of energy supply and international cooperation,* the European Commission (2011) stressed that a "comprehensive and coherent legal environment for EU energy relations with key suppliers and transit countries" is crucial for further regulatory convergence with EU neighbours. More recently Commissioner Oettinger (2012), speaking at the Energy Charter Conference, recalled the core objective of the ECT being "to promote a global model for energy cooperation in the long term within the framework of a market economy and based on mutual assistance and the principle of non-discrimination".

Official documents suggest that the Commission had a *preference* for a legal environment for EU energy relations. The Commission was interested in regulatory convergence of EU countries, and in promoting a global market for energy cooperation. Interview data seems to confirm this statement. According to an official

working at the Commission, the ECT was meant to promote some rules of transparency in order to promote investments and trade with Russia (Interview No 4). It seems therefore sensible to define the *preference* of the Commission as "legal framework for trade of and investment in energy". How is this *preference* of the Commission supposed to serve the *interest* of further integration? As will be explained more in detail in section 7.4. of this chapter and as suggested in the context section (7.2.), the ECT might be seen as an opportunity for the Commission to expand its competences in the energy field. Being part of an international organisation dealing with energy would give the Commission the opportunity to play a role in the external dimension of the EU's internal energy market by, in the first instance, promoting EU legislation in non-EU countries.

Data suggests that the *preferences* of the principals and the *preferences* of the agent can be defined as homogenous (IV2). The Member States and the Commission both had a *preference* for a "legal framework for trade *of and investment in energy"*. That same *preference*, however, is supposed to serve different *interests*. On the one hand, Member States expected that a legal framework for trade and investment would have beneficial consequences for their national energy policies. Being part of the ECT then is a means to maintain control over national energy policies when it comes to the external dimension. On the other hand, a "legal framework for trade *of and investment in energy*" would also serve the *interest* of the Commission for competence-maximization.

To summarise this section, data indicates that the *preferences* among the principals was heterogeneous (IV1) and homogenous were the *preferences* between the principals and the agent (IV2). In the next section, the effect of these variables on the Commission's deviation from Member States' *preferences* are analysed. More precisely, the next section investigates whether the Commission tried to deviate from the *preferences* of the Member States on the ECT.

7.4. The Commission in the ECT

This section analyses the conditions under which the independent variables– the *preference* alignment among the principals (IV1) and the *preference* alignment

between the principals and the agent (IV2) – affected the Commission's deviation from Member States' *preferences* in the ECT. This section investigates whether the Commission behaved as a faithful agent or whether it deviated from the *preferences* of the Member States in the ECT. In doing so, the section looks at the role played by the independent variables in affecting the Commission's behaviour.

Given the values of the independent variables on this case, the following hypotheses are tested: *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from preferences of the principals* (H2) and *when the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H4).

As described in more depth in the research design of this thesis (3.5.), the situation that the Member States have heterogeneous *preferences* may be exploited by the Commission to deviate from Member States' *preferences*. As has been stated by Pollack (1997, 129), the Commission can exploit circumstances where Member States have different *preferences* "to shirk within certain limits, exploiting cleavages among the member states to avoid sanctions, Council overruling of decisions, or alteration of the agent's mandate". This is assumed to be because the use of control mechanisms and sanctions would be costly, as the Member States have different *preferences*.

The logic behind H4 is that the agent and the principals, or some of the principals, even if they have different *interests*, might share homogeneous *preferences*. If this is the case, the Commission is not expected to deviate, as the homogeneity of *preferences* between the principals and the agent may open the way for some scenario of cooperation in order to achieve the common *preferences*. In that situation, the Commission is not expected to deviate from Member States' *preferences* as those *preferences* are similar to their own.

In order to test the two hypotheses, this chapter looks at the ECT as an ongoing process which began in 1995 immediately after the Treaty was signed by the Commission and by each of the Member States. This case study therefore looks at the post-delegation phase of the PA relation between the Commission and the Member States. This section distinguishes between two units of observation: the first one looks at the process

leading to the conclusion of the ECT i.e. the negotiation phase of negotiations of the ECT. The second part of the analysis the role of the Commission in the institutional framework created by the ECT, notably the Energy Charter Conference.

7.4.1. The Commission as negotiator of the ECT

Literature on the genesis of the Energy Charter, although limited and not very recent, offers some useful insight about the dynamics among the Member States and between the Member States and the Commission during the negotiations of the Treaty. Doré and De Bauw (1995, 1–2) for instance, highlight that Lubbers' initiative was first met with "some scepticism" in the European Council. Matlary (1997) stresses the different positions of the UK, France, Germany and Italy. As was illustrated in more depth in section 7.3.1. above on the *preference* alignment among the Member States, France was initially reluctant on the ECT and only when the work progressed, did it begin to participate fully. The UK and Germany strongly favoured the Charter as a means to extend liberalisation of the energy market, but were opposed to any transferral of power to the EU institutions or a new supranational institution. Italy supported the Charter from the beginning. Starting from the scenario depicted by those sources, this chapter has argued that the *preferences* among the principals are heterogeneous. It is again Matlary (1997) who suggests that while Member States were struggling to find an agreement on which international organisation would take the lead of the Charter, the Commission exploited that moment to take the lead in the process. This behaviour of the Commission is in line with PA literature which assumes that when principals have different *preferences*, the agent is likely to exploit the situation to avoid the imposition of sanctions, especially if any effort to sanction the agent requires a unanimous agreement among the principals (Pollack 2003; Mathew D. McCubbins, Noll, and Weingast 1987; Matthew D. McCubbins, Noll, and Weingast 1989). Building on this theoretical assumption, this case seems to suggest that the Commission exploited the differences among the Member States in order to play a leading role in the ECT. As stated by Matlary (1997, 117):

> "while the States were trying to decide which international organisation should be the seat of the charter, the Commission had gone to work and had completely taken over the process by defining the topics for negotiation, and then, after this framework had been established, presenting it to the States."

Data indicates that the ECT was a Dutch initiative. Member States were initially sceptical towards the initiative and had different *preferences*. Finally, they agreed that a general mandate would be given to the Commission to negotiate a Charter. Lubbers' proposal found a strong supporter in the Energy Commissioner Cardoso e Cunha and in the former President of the Commission himself, Jacques Delors who "took an active interest in energy policy" (Matlary 1997: 109). Potentially exploiting the confusion among the Member States at the time, the Commission took the lead in the negotiations with Russia and CIS countries, and the secretariat was initially established in Brussels at the Energy Directorate (Matlary 1997, 99).

What was the rationale underpinning the Commission's behaviour during the negotiations of the ECT? Matlary argues that the Commission exploited the window of opportunity available in the 1990s to emerge as an "international actor to forge a comprehensive policy towards Eastern Europe" (Ibid, 77). Matlary also argues that "development of the Energy Charter was successful and provided the Commission with a new institutional role for itself." Other authors such as Mayer (2008, 255) argue that the Commission intended to "appropriate" the Charter process "to widen its energy competences."

Literature on the ECT depicts the Commission as a competence-maximizer that took advantage of the heterogeneity of *preferences* among the Member States in order to widen its competences. It could then be argued that during the negotiation of the ECT, the Commission tried to satisfy its *interest* for competence-maximization. This raises the question, however, which of the categorisations presented in section 3.3. (deviation or responsive autonomy) can best represent the Commission's behaviour for the purpose of this case study. As with the negotiation of the EnCT (7.1.) the Commission seems to behave as an agent trying to satisfy its interest, but still responsive to Member States' demands for, in this case, a "legal framework for trade of and investment in energy." An analysis limited only to the negotiation of the ECT would be insufficient

to understand the role of the Commission as an external representative. For this reason, the next section turns to the behaviour of the Commission in the Energy Charter Conference.

7.4.2. The Commission as external representative of the Member States in the Energy Charter Conference

A second unit of analysis concerns the Commission's behaviour at the Energy Charter Conference. Again, the logic behind this analysis is to understand whether the Commission behaved as a faithful agent in the Conference or whether it deviated from Member States *preferences*. In order to address this question, official documents, secondary sources and interviews have been studied.

The procedures for establishing a common position in the Energy Charter Conference are established in a Decision adopted by the Council and the Commission on 23 September 1997.[56] The Decision declares that the position which the EC/EU may be required to take within the Energy Charter Conference shall be adopted by the Council by qualified majority voting or unanimity, according to the subject matter of the decision to be taken.[57] In PA terms, the Decision can be seen as an *ex-ante* control mechanism as it establishes the administrative procedures which the agent must follow (Pollack 1997).

Public EU documents tell us little about the process through which common EC/EU positions to be presented in the ECT have been adopted by the Council.[58] The documents reporting the decisions of the Energy Charter Conference, recently derestricted and made available online by the Energy Charter Secretariat, also say little

[56] Decision adopted by the Council and the Commission on 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects (98/181/EC, ECSC, Euratom)

[57] The final decision provides that the position which the European Community may be required to take within the Energy Charter Conference with regard to decisions requiring the introduction or modification of Community legislation shall be adopted by the Council, acting in accordance with the relevant rules of the Treaty establishing the European Community. Notably, the Council shall act by qualified majority. The Council, however, shall act by unanimity if the decision to be taken by the Conference covers a field for which unanimity would be required for the adoption of internal Community rules. The Decision foresees that in other cases, the position to be taken by the European Community shall be adopted by the Council.

[58] Research carried out on Eurlex of the documents mentioning Decision 98/181/EC, ECSC, Euratom has not produced any results useful to understand the dynamics between the Member States and the Commission in adopting a common position to be presented in the ECT.

about the position of the individual signatories. This scarcity of public official documents therefore is filled with the analysis of interview data and secondary sources.

Secondary sources such as press releases, reports issued by think tanks or NGOs, and journalistic reports, do not seem to provide any evidence of conflict between the Member States and the Commission over the ECT. Rather, most of the sources focused on the limits of the ECT given that Russia has not ratified the Treaty. This point will be discussed later in this chapter.

Interview were carried out with officials working in the Commission and in a number of Permanent Representations. Interviewees provided a rather consistent description of how the position of the Commission in the Energy Charter Conference is taken. Officials working in the Permanent Representations argued that a common EU position is usually defined within the Council where a line to take is adopted and then presented by the Commission in the Energy Charter Conference (Interviews No 7, 10, 12). An official working within the Commission also confirmed that lines to take are discussed with the Member States before the meetings at the Energy Charter Conference where the Commission presents. Then, according to an interviewee working at the Commission, "there is also no problem whatsoever if Italy, Spain, Netherlands [...] take the floor to put more emphasis on that line that has been agreed" (Interview No 1). This scenario was also confirmed by a document of the UK Government, the Energy Report on the Review of the Balance of Competences between the United Kingdom and the European (UK Government 2014).

Asked about the coordination between the Commission and the Member States, interviewees from the Permanent Representations argued that it works most of the time (Interviews No 10, 12) and an official of the Commission stated that "coordination works extremely well" (Interview No 3).[59] Generally speaking, interview data did not

[59] A representative of a Permanent Representation stressed that the voting and the decision making process within the ECT were not really well defined especially as far as the appointment of a Secretary General is concerned (Interview No 7). At the time the research on the field was carried out, discussions on those rules and procedures were still ongoing. At the time of writing, not only has the issue not been resolved but also – given that "no agreement can be reached" – the mandate establishing the Working Group on Rules of Procedure for Appointing the Secretary General has been repealed (See:). Given the limited amount of sources available, however, it is not possible to understand the reason for the lack

reveal any major difficulty in the decision-making process. Of course, different Member States have different priorities (interviewees acknowledged that) but none of the interviewees complained about the Commission trying to abuse its position within the ECT.

Interview data also confirmed the role of a very useful control instrument that Member States can utilise. Indeed, Member States have a seat at the Energy Charter Conference and can take the floor. In PA terms, this means that the Member States can monitor the Commission. In PA terms this seems to be a very powerful *ad locum* control mechanism (Delreux 2011, Kerremans 2006; see also section 2.3.4. of this thesis).

Data indicates that the Commission has not tried to deviate from the *preferences* of the Member States while performing its role of external representation at the ECT. Hypothesis 4 developed in this thesis suggests that when the *preferences* of the principals are homogenous with those of the agent the latter would not try to deviate. Earlier in this chapter the *preferences* of the principals have been determined as homogeneous. In order to compare those *preferences* with the *preference* of the Commission, a small subset of principals sharing homogenous *preferences* has been identified. Comparing the *preferences* of that small subset to the Commission, the conclusion is that the *preferences* between the principals and the agent were homogeneous. All actors have a *preference* for a "legal framework for trade of, and investment in energy." Data analysed in this section seems to suggest that the Commission did not deviate from Member States *preferences*.

Section 7.2.2. stressed the homogeneity of *preferences* between the Commission and the Member States. The fact that secondary and interview data did not provide any evidence of conflict or disagreement between the actors in the ECT seems to confirm the hypothesis that when the *preferences* between the principals and the agent are homogeneous, deviation is less likely to occur. Both the Commission and the Member States seem to understand the ECT as a means to promote a regulatory framework for the EU and neighbouring countries in energy trade and investment. As foreseen by the

of agreement on the issue. Notably, is not clear whether it is due to a disagreement between the Member States and the Commission or a more general disagreement across all the parties of the Treaty.

PAM however, the actors maintain different *interests*. On the one hand, the Commission sees the ECT as a means to expand its competences, while Member States see the ECT as a way of keeping control over their national energy policies.

Is there any other reason – exogenous to the PA relationship - that might explain this absence of deviation? An official working at the Commission stressed that because the ECT covers trade, investment, and energy efficiency, which are EU competencies, the division of competences is very clear and coordination works extremely well (Interview No 3). Interviewees working in Permanent Representations also provided some useful insights on as to why there are no apparent conflicts between the Commission and the Member States. Firstly, some of them stressed that the ECT is very technical and does not really have a political impact (Interview No 21). More precisely, it is the Secretariat that updates the process and unless one of the signatories infringes the rules of the ECT and a dispute-settlement procedure is started, the ECT is not really a priority for Member States. The question must then be asked, as to whether other factors different from the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) might have affected the agents' behaviour in this case study. This point will be revisited in the Conclusion (chapter 8) of this thesis.

7.5. Conclusion

This chapter has analysed the ECT as a case of external representation of the Commission in international fora. The case analysed whether the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) affected the Commission in its behaviour vis-à-vis the preferences of the principals

The chapter defined the *preferences* of the principals on the ECT as *heterogeneous* across three groups: a) energy producers and traders that attach particular importance to the ECT, which is seen as an instrument of investment protection; b) EEC countries highly dependent on energy coming from Russia, that see the Treaty as a means to reduce their dependency, and finally c) Member States less dependent on energy from Russia that do not attach great importance to the ECT. In order to compare the

heterogeneous *preferences* of the principals with those of the Commission, an *empirically informed small subset of Member States sharing homogeneous preferences* was defined. The *preferences* of the principals were therefore been defined as a "legal framework for trade of and investment in energy." Consequently, the *preferences* of the principals were compared to those of the Commission which were also defined as a "legal framework for trade of and investment in energy." The *preferences* of the principals and those of the agent, then, were determined as homogeneous.

Given the values of the independent variables, the two hypotheses below were tested in this chapter. The hypothesis according to *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from preferences of the principals* (H2) and the hypothesis according to which *when the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H4). As far as the negotiation phase of the ECT is concerned, the chapter has shown that the literature on the topic (Matlary 1997; Mayer 2008) suggests that the Commission exploited the fact that the Member States had heterogeneous *preferences* to widen its energy competences. Section 7.4.1. indicated that, rather than deviation, this situation can be better described as responsive autonomy, because the Commission did try to satisfy its interests for competence-maximization, but was still responsive to the Member States' preferences for "a legal framework for trade of and investment in energy." Looking at the second phase however, the data suggests a different scenario. Given the limited amount of public documents available, the analysis was primarily based on secondary data and interviews. The analysis indicated that the Commission did not try to deviate from Member States' *preferences* as operationalised in the empirical subset for a "legal framework for trade of and investment in energy." This seems to suggest that, even during the negotiation phase, there was a homogeneity of preferences between the Commission and the Member States and, potentially, this might explain why the Commission did not deviate from the preferences of the Member States.

The analysis has highlighted many points in line with the PAM. Firstly, data seems to confirm the PA assumption that when Member States have heterogeneous *preferences* the Commission may deviate (Pollack 1997, 129). This hypothesis can be confirmed

by investigating the negotiation of the ECT. If we look at the ECT as a whole however, data seems to provide more support for hypothesis 4. Even if the Commission tried to maximize its competence during the negotiation of the ECT, it did not deviate from the Member States *preferences* for a "legal framework for trade of and investment in energy" in the Conference. Indeed, interview data does not provide any evidence for a deviation as such. This chapter has suggested that the reason for the Commission's behaviour can be found in the homogeneity of *preferences* between the Commission and the Member States. The fact that the Commission shared the same *preferences* as a subset of the Member States deprived the Commission of a real reason to deviate. The homogeneity of *preferences*, however, does not imply a homogeneity of *interests*. In line with the theoretical model presented in this thesis (2.3.2.), the common *preferences* for a "legal framework for trade of and investment in energy" are deemed to serve different *interests*: competence-maximization for the Commission and control over energy policy for the Member States.

The analysis has also stressed the importance of control mechanisms in preventing deviation. Firstly, the Decision for the conclusion of the ECT establishes that the position which the EC/EU may be required to take within the Energy Charter Conference shall be adopted by the Council (by qualified majority voting or unanimity, according to the subject matter of the decision to be taken). Interview data confirmed that before the meeting of the Energy Charter Conference, the Member States and the Commission discuss lines to take. Secondly, the institutional framework of the ECT also provides a powerful control mechanism, as both the Member States and the Commission have a seat at the Conference (*ad locum* control mechanism). The principals can therefore monitor the agent. Moreover, the chapter has investigated whether other reasons exogenous to the principal-agent relationship, such as its technical character and its low political sensitivity, may explain the absence of deviation in the ECT. The chapter concludes that the homogeneity of *preferences* seems to provide some explanatory power for the absence of deviation in this case study. The extent to which the independent variables chosen for this thesis can explain the agent's behaviour is analysed more in detail in the next chapter (Conclusion) in light of the results of the analysis of the four case studies.

Table 7.2: List of the signatories of the ECT with ratification dates

Country	ECT signed	ECT ratified
Afghanistan	n/a	19 January 2013
Albania	17 December 1994	15 December 1997
Armenia	17 December 1994	18 December 1997
Australia*	17 December 1994	pending
Austria	17 December 1994	12 August 1997
Azerbaijan	17 December 1994	02 December 1997
Belarus*	17 December 1994	Provisional application
Belgium	17 December 1994	16 April 1998
Bosnia and Herzegovina	14 June 1995	10 January 2001
Bulgaria	17 December 1994	31 July 1996
Croatia	17 December 1994	31 October 1997
Cyprus	17 December 1994	02 January 1998
Czech Republic	08 June 1995	29 March 1996
Denmark	17 December 1994	22 August 1997
Estonia	17 December 1994	09 April 1998
European Union and Euratom	17 December 1994	n/a
Finland	17 December 1994	11 July 1997
France	17 December 1994	01 September 1999
Georgia	17 December 1994	22 February 1995
Germany	17 December 1994	14 March 1997
Greece	17 December 1994	16 July 1997
Hungary	27 February 1995	01 April 1998
Iceland*	17 December 1994	x
Ireland	17 December 1994	30 March 1999

Italy	17 December 1994	05 December 1997
Japan	16 June 1995	23 July 2002
Kazakhstan	17 December 1994	18 October 1995
Kyrgyzstan	17 December 1994	08 April 1997
Latvia	17 December 1994	10 November 1998
Liechtenstein	17 December 1994	03 December 1997
Lithuania	05 April 1995	29 July 1998
Luxembourg	17 December 1994	07 February 1997
Malta	17 December 1994	21 May 2001
Moldova	17 December 1994	10 June 1996
Mongolia	21 July 1999	21 July 1999
the Netherlands	17 December 1994	11 December 1997
Norway*	16 June 1995	x
Poland	17 December 1994	24 November 2000
Portugal	17 December 1994	11 December 1997
Romania	17 December 1994	10 March 1996
Russian Federation[60]	17 December 1994	Provisional application until 18 October 2009 inclusive
Slovakia	17 December 1994	07 September 1995
Slovenia	17 December 1994	23 July 1997
Spain	17 December 1994	11 December 1997
Sweden	17 December 1994	13 November 1997

[60] On 20 August 2009 the Russian Federation officially informed the Depository that it did not intend to become a Contracting Party to the Energy Charter Treaty and the Protocol on Energy Efficiency and Related Environmental Aspects. In accordance with Article 45(3(a)) of the Energy Charter Treaty, such notification results in Russia's termination of its provisional application of the ECT and the PEEREA upon expiration of 60 calendar days from the date on which the notification is received by the Depository.

Switzerland	17 December 1994	28 May 1996
Tajikistan	17 December 1994	17 December 1994
The former Yugoslav Republic of Macedonia	26 March 1998	26 March 1998
Turkey	17 December 1994	13 February 2001
Turkmenistan	17 December 1994	10 July 1997
Ukraine	17 December 1994	06 February 1998
United Kingdom	17 December 1994	13 December 1996
Uzbekistan	05 April 1995	22 December 1995

(Source: http://www.encharter.org/index.php?id=61

Chapter 8 Conclusion

8.1. Introduction

This chapter aims to draw some conclusions about the research conducted in this thesis. It is structured as follows. The next section (8.2.) recapitulates the results of this thesis. Section 8.3 then turns to the implications of the findings and the contribution of this thesis to the PA literature. The sections revisits the main assumptions of the model used in this thesis in light of the analysis conducted in the empirical chapters. Section 8.4. stresses some of the shortcomings of the Principal-Agent Model of Delegation (PAM) and, at the same time, highlights some possible avenues for future research.

The aim of this research was to explain the Commission's behaviour vis-à-vis its principals in the *external dimension of the EU internal energy market*. In doing so, this thesis has explored *under what conditions the Commission tries to deviate from the preferences of the principals*. Developing from the analytical requirements proposed by this research question (actor-centric, state-centric and inter-institutional relations) the PAM was chosen as the theoretical framework (Chapter 2). Two factors were suggested as conditions, independent variables, likely to affect the Commission's deviation (the dependent variable): the *preference* alignment *among the principals* (IV1) and the *preference alignment* between the principals and the agent (IV2) (Chapter 3). Looking at the different possible values of the independent variables, this thesis developed four hypotheses about the conditions under which the Commission tries to deviate from the preferences of the Member States (3.5.). These hypotheses were then tested across four different case-studies. As will be illustrated in this

chapter, this research suggests that the agent's behaviour is affected by the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2). In addition, the distinction between *preferences* and *interests* (Milner 1997) seems to be a useful simplification for focusing on the actual policy choices of these actors and to give a more realistic picture of the Commission's behaviour beyond the dichotomy of deviation/non deviation.

8.2. Recapitulation of the results

This section summarises the main results of this thesis recalling the hypotheses tested and the outcome observed in each case study. The implications of these results, together with the broader implication of the findings, are illustrated in more depth in the next section (8.4).

Chapters 4 and 5 provided some evidence of deviation of the Commission from the *preferences* of the Member States. These two case studies seem to support the third hypothesis of this research that *when the preferences between the principals and the agent are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals (H3)*. In both cases, the *preferences* alignment between the principals and the agent was defined as heterogeneous (IV2). The Commission seems to have taken advantage of its position as initiator of legislation and put forward very ambitious proposals that had to be dealt with by co-decision. The Commission's proposals generated a "conflict situation" (Da Conceição 2010: 1110) between the latter and the Member States.

As far as the *preference* alignment among the principals (IV1) is concerned, chapter 4 tested the first hypothesis of this thesis: *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals (H1)*. Chapter 5, instead, focused the second hypothesis according to which *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from preferences of the principals (H2)*. Chapter 4, did not provided any strong evidence to support the first hypothesis because, although the Member States had homogeneous preferences against the Commission's proposal, the latter pushed that proposal forward. Chapter 5, instead, tested what might occur when the

preferences alignment among the principals is heterogeneous (IV1). The chapter indicated that the hypothesis according to which *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from preferences of the principals (H2)* appears to be verified in this case. Notably, the chapter showed that the Commission was aware that the Member States had different preferences on unbundling and proposed Ownership Unbundling (OU) as preferred option, possibly aware that Member States would struggled to amend the proposal (5.4.2.). This was indeed the case: finding a common position in the Council of Ministers proved very hard and some countries proposed a third option as an alternative to the two proposed by the Commission (5.4.4.).

Chapters 6 and 7 looked the Energy Community Treaty (EnCT) and the Energy Charter Treaty (ECT) respectively. Distinct from the case studies about EU internal legislation, in these cases, the *preferences* of the principals were homogeneous with those of the agent (IV2). Both chapters then tested whether *when the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals (H4)*. Chapters 6 and 7 suggested that the fourth hypothesis of this thesis seems to be verified, as the Commission did not deviate from Member States' *preferences*. More precisely, both chapters looked at two different phases. The first phase dealt with the negotiations of the EnCT (6.4.1.) and the ECT (7. 4.1.) respectively while the second phase looked at the actual role of the Commission as representative of the Member States in the institutions created by the relevant treaties studied (6.4.2. for the EnCT and 7.4.2. for the ECT). In both chapters, data suggested that during the negotiation phase, the Commission behaved as competence-maximizer, trying to grant itself as much competence as possible in both the EnCT and the ECT. Both chapters also highlighted how the Member States used several control mechanisms to constrain the Commission in its role of external representative. The sections on the actual behaviour of the Commission in both the EnCT (6.4.2.) and the ECT (7.4.2.) however, did not provide evidence of a "conflict situation" between the Member States and the Commission over the role of the latter as external representative. For this reason, both chapters concluded that the Commission did not deviate from the preferences of the Member States and the fourth

hypothesis of this thesis seems to be verified. These cases indicated a scenario of **responsive autonomy** in the case of negotiation of both the EnCT and ECT. Although trying to satisfy its interest for competence-maximization, the Commission was still responsive to Member States' *preferences* for a "common energy market with the SEE countries" (chapter 6) and for a "legal framework for trade of and investment in energy" (chapter 7).

As far as the *preference* alignment among the principals (IV1) is concerned, chapters 6 and 7 present different scenarios. On the EnCT (Chapter 6) the *preferences* among the principals were defined as homogeneous and, therefore, the first hypothesis of this thesis was tested i.e. *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H1). By contrast, for the ECT (Chapter 7), the *preferences* of the principals were defined as heterogeneous and the second hypothesis of this research was tested: *when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals (H2)*. Chapter 6 concluded that the first hypothesis of this thesis seems to be verified, as the Commission did not deviate from the *preferences* of the Member States. As mentioned earlier in this section, although the Commission tried to maximise its competences in the negotiation phase of the EnCT, it did not create any conflict situation with the Member States while performing its role as representative in the institutions of the EnCT (6.4.2.). On the other hand, Chapter 7 did not seem to provide any significant evidence in support of hypothesis 2. Although the Commission tried to maximize its competences in the negotiation phase of the ECT, the case study did not seem to provide any evidence of conflict situation between the Member States and the Commission on the role performed by the latter in the institutions of the EnCT (7.4.2.).

Table 8.1: Summary of the results

Case study	Hypothesis tested	Possible outcomes			Outcome observed:
		Full compliance	Responsive autonomy	Deviation	
Case study 1	H1	?	?	✗	Deviation
	H3	✗	✗	✓	
Case study 2	H2	✗	✗	✓	Deviation
	H3	✗	✗	✓	
Case study 3	H1	?	?	✗	Responsive autonomy and Full compliance
	H4	?	?	✗	
Case study 4	H2	✗	✗	✓	Responsive autonomy and Full compliance
	H4	?	?	✗	

This section has therefore recalled the main results of the empirical chapters which include deviation (chapters 4 and 5), responsive autonomy, and full compliance (chapters 6 and 7). These results raise several questions about, for instance, the usefulness of the categorization of agent's behaviour, the explanatory powers of the independent variables, and the existence of other possible explanatory factors. Unexpected findings also emerged. These points are discussed more in detail in the following section.

8.3. Implication of the findings and contribution to knowledge

This section reflects upon the implication of the findings of this thesis and their contribution to knowledge. The section is structured around seven main points: the categorisation of the agent's behaviour, the explanatory power of the independent

variables, the control mechanisms, Milner's (1997) distinction between *interests* and *preferences*, the use of an *empirically informed small subset of Member States sharing homogenous preferences* as an analytical device, the use of a wide range of sources and, finally, some consideration about the generalizability of the findings of this research. In doing so, the section reviews some of the theoretical and methodological choices presented in chapters 2 and 3. In revisiting these choices the section also reflects some unexpected results, such as the importance of conflict as an indicator of deviation (8.3.1), the different agent behaviour in internal legislation and external representation (8.3.3), and the importance of control mechanisms (8.3.3.).

8.3.1. Categorisation of the agent's behaviour: deviation, responsive autonomy or compliance

What do these results say about the agent's behaviour and its categorisation as proposed in the research design of this thesis (3.3.)? The categorisation was as follows: a) compliance or absence of deviation, b) responsive autonomy and c) deviation. The case studies analysed in this thesis seemed to suggest a varied scenario that a mere dichotomy of *deviation* or *no deviation* was unlikely to capture fully. There were cases in which the Commission tried to satisfy its own preferences and yet tried to be responsive to the Member States' demands. So far, most of the literature has distinguished between *shirking* (stressing the opportunism of the agent) and *slippage* (stressing the incentives coming from the structure of delegation) (Pollack 2003). This distinction, however, is not always clear, as the same Commission's behaviour may be interpreted as one or the other (Kerremans 2006). PAM does not really offer many analytical tools to assess whether the agent acts according to opportunism or incentives. Stemming from Rational Choice Institutionalism (RCI), the PAM assumes that the actors aim to maximize their utility and satisfy their interests. RCT however, tell us little about the deep meaning underpinning of the actions of both the principals and the agent.

Chapters 4 and 5 suggested that the Commission behaved as "own actor", issuing proposals aiming at satisfying its own preferences and not those of the principals. These chapters provided some evidence of a conflict situation in existence between the Member States and the Commission. The chapter seemed to suggest that when the

agent deviates from the preferences of the principals, it triggers their reaction leading to a situation of conflict or tug-of-war between these actors (see 4.4. and 5.4.). An important finding of this research then is that the conflict situation might be an indicator that **deviation** has occurred: the agent has crossed the red line and has triggered a reaction by the principals. This seemed to be the case in both chapter 4 and chapter 5 where Member States fought against the Commission's proposal.

Chapters 6 and 7 however offered a more complicated picture. These chapters looked at two distinct phases: the negotiation of the EnCT and the ECT on the one hand and the actual behaviour of the Commission in the institutions created by these treaties on the other. The negotiation phases of both the EnCT (6.4.1.) and the ECT (7.4.1.) indicated that Commission tried to maximize its competences. However, this did not seem to go against Member States *preferences* for a common market in energy with Southern-Eastern European countries and for a legal framework for trade of and investment in energy respectively. Moreover, the behaviour of the Commission did not generate a conflict likely to result in questioning the very existence of the EnCT or the ECT. The Commission seemed to take advantage of its autonomy or discretion, but was still responsive to Member States' *preferences*. This Commission behaviour seems to be better described as "responsive autonomy."

If we look at the actual behaviour of the Commission in the institutions created by the EnCT (6.4.2.) and the ECT (7.4.2.), data did not seem to suggest any strong evidence of a conflict situation between the Commission and the Member States. On the contrary, Member States' officials that were interviewed were rather satisfied about the role of the Commission. Chapters 6 and 7 also stressed that Member States used several control mechanisms to control the Commission. As far as the EnCT is concerned, they made sure that the Commission always had to consult the Council before a decision affecting the Member States was to be taken in the EnCT institutions. In the ECT, Member States are also present at the meetings and can take the floor at any time. These points might also explain the Commission's **compliance**. While this chapter will return later to the reasons underpinning this state of affairs, for the purpose of this sub-section, it is important to stress that in chapters 6 and 7 the Commission seemed to behave as a compliant or responsive agent in the post-delegation phase. For

this reason, the categorization of agent's behaviour offered in chapter 3 (3.3.) of this thesis seems to be supported by empirical evidence and might therefore be a useful starting point for further research on the agent's behaviour. The following section now turns to the explanatory power of the independent variables to investigate to what extent they can account for the Commission's behaviour.

8.3.2. Explanatory power of the independent variables

To what extent can the *preference* alignment among the member States (IV1) and *preference* alignment between the principals and the agent (IV2) account for the Commission's deviation from the preferences of the Member States? The results of this thesis suggest that the explanatory factors proposed for this study do not seem to have the same weight. Rather, the *preference* alignment between the principals and the agent (IV2) seems to affect the Commission's deviation more than the *preference* alignment among the principals (IV1) does.[61] This subsection reflects upon the explanatory power of the first independent variable, recalling the first and second hypotheses of this thesis. A second subsection turns to the second independent variable and recalls the third and fourth hypotheses.

The *preference* alignment among the Member States (IV1) (hypotheses 1 and 2). The explanatory power of the *preference* alignment among the Member States (IV1) was tested in the first and second hypotheses of this thesis.[62] Chapter 6 (on the EnCT) seemed to provide some evidence in support of the first hypothesis, suggesting that the *preferences* among the principals were *homogeneous* (IV1) and that the Commission did seem to try to deviate from the *preferences* of the Member States. The same hypothesis, however, was not particularly well-supported by the evidence in chapter 4, where the homogeneity of *preferences* among the Member States did not seem to

[61] Results suggested that in two instances (Chapter 4 and Chapter 7) the hypotheses concerning the *preference* alignment among the principals (IV1) – notably hypotheses 1 and 2 - were not fully confirmed by data. The homogeneity of *preferences* among the Member States in chapter 4 did not stop the Commission from deviating from the *preferences* of the Member States. Similarly, chapter 7 – where the *preferences* among the principals were heterogeneous – did not seem to provide any strong evidence of Commission's deviation or conflict situation between the Commission and the Member States.

[62] H1: *when the preferences among the principals are homogenous, the agent is less likely to try to deviate from the preferences of the principals;*
H2*: when the preferences among the principals are heterogeneous, the agent is more likely to try to deviate from the preferences of the principals.*

prevent the Commission from deviating from the Member States' *preferences*. In both chapters, it is the second independent variable rather than the first one that seems to better explain the deviation in the dependent variable. Chapter 6 also suggested that the *preference* homogeneity between the principals and the agent might explain the absence of deviation from the Commission. Chapter 4 suggested that despite the *preferences* among the principals being homogenous on the IGAs, the Commission behaved hazardously and tried to deviate from the *preferences* of the Member States by issuing a very ambitious proposal close to its own preferences, rather than those of the principals. This raises the question of why this happened. Interview data collected both from the Commission (Interview No 3) and from the Member States (Interview No 11) suggested that the Commission tried to realise an information exchange mechanism for the IGAs, despite that Member States opposed such a mechanism. The chapters also suggested that the *heterogeneity* of preferences between the principals and the agent (IV2) has greater validity at explaining the Commission's behaviour on IGAs. The *preferences* of the Commission were different from those of the Member States and the Commission seems to have tried to satisfy its own *preferences* even if it knew that Member States did not have a *preference* for an information exchange mechanism. This point will be analysed further in the next subsection.

As for the second hypothesis (when the preferences among the principals are *heterogeneous* the Commission is more likely to try to deviate), it seemed to be verified in chapter 5 and only partially verified in chapter 7. In chapter 5, the case study seemed to suggest that the Commission exploited the fact that the Member States had heterogeneous *preferences* on unbundling by issuing a proposal pushing forward its own preference for OU. It should be noted however, that the main reason for the Commission deviation seemed to be – again – the heterogeneity of *preferences* with the Member States (IV2). Heterogeneous *preferences* among the principals (IV1), only seems to come second in terms of explanatory power. This seems to verify the second hypothesis. On the other hand, in chapter 7 on the ECT, the second hypothesis was not fully verified. This was because, in the negotiation phase of the ECT, the Commission tried to maximise its competence but without challenging the Member States' *preference* for the ECT itself. In the previous subsection of this chapter (8.2.) this

behaviour has been labelled as "responsive autonomy." Indeed, the chapter did not provide any evidence of a conflict situation arising between the Member States and the Commission on the ECT. The chapter also suggested that one reason that the Commission did not try to deviate in performing its role of external representative in the institutions created by the ECT seemed to be a shared *preference* for a "legal framework for trade of and investment in energy." This point leads us to the second independent variable upon which the next subsection reflects.

The *preference* alignment between the principals and the agent (IV2) (hypotheses 3 and 4). Different conclusions can be drawn as far as the *preference* alignment between the principals and the agent is concerned (IV2). This independent variable seems to provide greater explanatory power for the Commission's deviation. Chapters 4 and 5 provided strong evidence supporting the hypothesis that when the *preferences* between the principals and the agent are heterogeneous, the latter is more likely to try to deviate (H3). Chapter 4 suggested that the Commission had a *preference* for a legal instrument for the exchange of information on IGAs while Member States had a *preference* for the protection of commercially sensitive information. By the same token, chapter 5 showed that the Commission had a *preference* for OU while Member States had a *preference* for a third option. The second independent variable of this research, then, seems to provide more explanatory power for the Commission's deviation from the preferences of the Member States in chapters 4 and 5. In both chapters, the behaviour of the Commission seemed to be better explained by the attempt of the latter to satisfy its own preferences rather than those of the principals.

In addition, chapters 6 and 7 suggested that the homogeneity of *preferences* between the Commission and the Member States seem to explain why deviation did not occur in these case studies. These chapters tested whether *when the preferences between the principals and the agent are homogenous, the agent is less likely to try to deviate from the preferences of the principals* (H4). The case studies provided some evidence of the Commission behaviour as "responsive autonomy" or "compliance", supporting this hypothesis. As mentioned above, rather than the homogeneity or heterogeneity of *preferences* among the principals (IV1), the behaviour of the Commission in the ECT

and the EnCT seemed to be better explained by a convergence of preferences between the latter and the Member States.

To sum up this section on the explanatory power of the independent variables, the second independent variable (IV2) seems to affect the Commission's deviation from the *preferences* of the Member States more than the first independent variable (IV1) does. Although the *preference* alignment among the Member States (IV1) does matter because it allows an effective use of control mechanisms and, potentially, sanctions by the Member States, when the Commission deviates, the dominant reason seems to be that its *preferences* are different from those of the principals (IV2). When this happens, deviation seems to be more likely when the *preferences* among the principals are heterogeneous and less likely when the *preferences* among the principals are homogeneous. As the next subsection (8.3.3.) will show however, data also suggested that factors other than the independent variables could have affected the Commission's behaviour in the case studies analysed in this thesis. One of these factors could be the control mechanisms.

8.3.3. Control mechanisms

The empirical chapters showed that the Member States made an extensive use of *ex-ante*, *ex-post* and *ad-locum* mechanisms. Chapters 4 and 5 suggested that the co-decision procedure (or ordinary legislative procedure after the Lisbon Treaty) can be seen as an *ex-ante* control mechanism, as it establishes the procedure to be followed for the creation of EU legislation. This procedure ensures that the Parliament and the Council agree on the text of new legislation.[63] These chapters showed that the Council has made use of the tools offered by the legislative procedure to push its *preferences* further. In both cases studied, the Council amended the Commission's proposal in order to make the final legislation as close as possible to its own *preferences*. Chapter 4 on Decision 994/2012 showed that the Council used the threat of rejection of the Commission's proposal to constrain the Commission and force it to step back (see 4.4.3.). The chapter also suggested that the Decision itself contained an *ex-post* control mechanism because it ensured that the Commission has to submit a report on the

[63] The role of the Parliament is discussed later on in this chapter

application of the Decision (see 4.4.5.). Chapter 5 also confirmed the Council's use of the tools offered by the legislative procedure to push its *preferences* further. As a result, Directive 2009/73/EC does not only offer OU and ISO, as proposed by the Commission, but also a third option (EEU) as requested by the eight Member States most active in their opposition to the Commission. Member States also used an informal tool to affect the legislative process on Directive 2009/73/EC: a letter to the President of the ITRE Committee, to the President of the Energy Council, and to the Energy Commissioner (5.4.4.). Chapter 5 also suggested that other control mechanisms were set in the Directive itself, such as criteria for the certification to be given to a non-EU company in order to operate within the EU (see section 5.5.).

Chapters 6 and 7 also seemed to highlight the use of control mechanisms. Both cases (Decisions for the Conclusions of the EnCT and the ECT respectively), contained the rules for the procedures on the position to be taken by the EC/EU in the institutions created by the EnCT and the ECT. In both cases, the Council proposed several amendments to the Commission proposals for the Decisions, to ensure they (the Council) were in control of the process. The Council, therefore, set the rules before the game (that is, the representation of the EC/EC in the EnCT) began (6.4.1.). In addition, Chapter 7 showed that the institutional framework of the ECT also provides another powerful control mechanism, as both the Member States and the Commission have a seat at the Conference (7.4.5.). This can be seen as an *ad locum* control mechanism where principals "are able to observe and control the agent's negotiation behaviour directly" (Kerremans 2006).

What consideration can we draw from the results above? The first one might be about the link between *preferences* and control mechanisms. In the research design (3.4.), it was argued that when the *preferences* among the principals are homogeneous, principals can make a more effective use of control mechanisms and sanctions. As recalled in the previous paragraph, Member States used control mechanisms not only when the *preferences* among the principals were homogeneous (Chapter 4 and 6), but also when their *preferences* were heterogeneous (Chapter 5 and 7). As far as the *preferences* alignment between the Member States and the Commission is concerned

(IV2), control mechanisms were used both in case of homogeneity (Chapters 6 and 7) and heterogeneity (Chapters 4 and 5).

Since the purpose of this thesis was to look at how the homogeneity of *preferences* (and not the control mechanisms) affect the Commission's deviation from the *preferences* of the Member States, drawing some conclusions about the correlation between control mechanisms and deviation would be hazardous. The research however, unexpectedly showed the important role of the control mechanisms. The empirical chapters suggested that the Member States always used control mechanisms. When the *preferences* among the principals were homogeneous (as in Decision 994/2012 and in the EnCT), Member States used both *ex-ante* and *ex-post* control mechanisms. Member States did the same, however, when the *preferences* among them were heterogeneous (as in Directive 2009/73/EC and in the ECT). It is possible that more extensive use of control mechanisms has been made in the cases where the Commission and the Member States had heterogeneous *preferences* (Decision 994/2012 and Directive 2009/73). The conflict situation that emerged between the Commission and the Member States pushed the latter to use all the means at their disposal to fight a proposal which they deemed contrary to their own *preferences*. Member States, however, used control mechanisms even when their *preferences* were homogenous with those of the Commission. Chapters 6 and 7 showed that Member States constrained the Commission with precise rules about the adoption of an EC/EU position in the EnCT and the ECT. In the former, the Council established *ex-ante* control mechanisms to make sure it could not lose control of the situation in the EnCT institutions. Chapters 6 and 7 then, suggest that even when they share homogenous *preferences* with the Commission – in these cases for "common market in energy with Southern-Eastern European countries" and a "legal framework for trade of and investment in energy" – Member States wanted to make sure that the Commission was not left with the opportunity of taking advantage of its role of external representation and satisfy its own *preferences* rather than those of the principals.

This latter point about the use of control mechanisms raises another question about the reasons for non-deviation in chapters 6 and 7. Was that as a result of homogeneity of *preferences* (IV2) or because of the effectiveness of control mechanisms, or was it due

to other characteristics of the EnCT and ECT? All the explanations could actually address this question. The real problem is that a clear measurement of the effect of *preferences* and control mechanisms on the dependent variable is still lacking in the literature. The empirical chapters of this research showed that both the *preferences* and the control mechanisms affect the Commission's deviation from the *preferences* of the Member States. Chapters 6 and 7, however, leave the question open about the extent to which the *preference* alignment between the principals and the agent on the one hand and the control mechanisms on the other affected the Commission's behaviour. In addition, chapters 6 and 7 also pose another question about what in the literature is called *observational equivalence* (Weingast and Moran 1983; Damro 2007). Observational equivalence means that a perceived absence of control or conflict between principal and agent can be explained as either a case of extreme agent autonomy or near perfect principal control. This could actually be the case in the EnCT and ECT, where data has not suggested any conflict between the principals and the agent over the EU representation in the institutions created by those treaties. As far as control is concerned, it can be argued that the *ex-ante* control mechanisms established by the Decisions for the conclusions of these treaties were so effective as to prevent deviation.

To summarise this section on control mechanisms then, the empirical chapters of this thesis showed that the principals made extensive use of *ex-ante*, *ex-post* and *ad locum* control mechanisms. Data provided in the chapter seems to support the PAM claim that the control mechanisms affect agent autonomy and prevent deviation. The results about control mechanisms also highlighted some limitations that future research may address, such as the lack of a clear measurement of control mechanisms and observational equivalence. The next section offers some considerations about some of the methodological choices taken in this thesis that may contribute to PA literature.

8.3.4. The distinction between interests and preferences (Milner 1997)

This thesis has used Milner's (1997) distinction between *interest* and *preferences* (2.3.2.); *interests* were defined as "fundamental goals, which change little" and *preferences* as "the specific policy choice that actors believe will maximise either their

income or chances of re-election on a particular issue" (Ibid.). As analysed in depth in the theoretical framework of this research (2.3.2.), *interests* can be seen as given and exogenous but *preferences* are seen as endogenous and need to be inferred empirically on a case-by-case basis. Empirical chapters showed that looking at the *interests* as given is sensible because data supports the claim that the interest of the Commission is competence-maximization. Notably, data seems to suggest that all the *preferences* identified across the four cases were meant to serve that *interest*. A legal instrument for the exchange of information on IGAs (Chapter 4), Ownership Unbundling (Chapter 5), a common energy market with the SEE countries (Chapter 6) and a "legal framework for trade of and investment in energy" (Chapter 7) were intended to serve the Commission's interest for competence-maximization. As far as the *preferences* are concerned, the empirical chapters suggested that for the *preferences* to be inferred, a wide range of sources is necessary. For this reason, the empirical chapters built on a range of primary and secondary sources. The chapter also confirmed that preferences cannot be assumed, as is perhaps more the case with *interests*, but need to be inferred through careful analysis of data.

The main advantage of the distinction between *interests* and *preferences* however, is that it accounts for situations in which the principals and the agent share the same *preferences* even if they have different *interests*. In turn, this goes beyond the mere dichotomy of deviation/non-deviation and accounts for situations "in-between" these two scenarios. More precisely, chapters 6 and 7 showed that on the EnCT and the ECT respectively, the Commission and the Member States had homogeneous *preferences*, even if those preferences were intended to serve different interests. These chapters showed that during the negotiations for these treaties, the Commission acted as competence-maximizer, trying to satisfy its interest for further integration of the internal energy market but at the same time, was still responsive to Member States' demands for an EnCT and an ECT. This means that the Commission behaved as somewhere in-between a faithful agent and own actor. This state of affairs is better described as "responsive autonomy" than it would be by using the mere dichotomy of deviation/non-deviation. Chapters 6 and 7 also showed that the distinction between *interests* and *preferences* also accounted for the absence of deviation in Commission

actual external representation in the EnCT (6.4.2.) and ECT (7.4.2.). Despite the Commission having different *interests* from the Member States, both shared the same preferences for the EnCT and ECT and this seems to have prevented deviation by the Commission (On other factors that may explain this absence of deviation see section 8.3.2.).

Milner's distinction is, however, a simplification of a much more complicated picture. As mentioned earlier in this thesis (chapter 2), the assumption that the Commission has fixed, fundamental goals is challenged in the same PA literature (see for example Norman 2015; Randour, Janssens, and Delreux 2014; Dijkstra 2013). For the sake of simplification, this assumption was used in this thesis to build a testable model.

In summary, it is important to stress for the scope of this subsection, that the empirical chapters of this thesis suggest that the distinction between *interests* and *preferences* might be useful in going beyond the simple dichotomy of deviation/non-deviation and provide a more realistic picture of the Commission's behaviour.

8.3.5. An analytical device: the empirically informed small subset of Member States sharing homogenous preferences

Chapters 5 and 7 operationalised the preference among the principals (IV1) as *heterogeneous*. As described in depth in the research design section (3.3.), comparing the *preferences* of the agent to those of the principals can be particularly difficult in a situation characterized by heterogeneous *preferences* among the principals (Delreux 2011, 55). Delreux uses the pivotal player preference within the collective principal as benchmark for "the preference of the principals" in order to compare them to those of the agent. The *preferences* of the agent are considered homogenous with those of the principals if they fall within the majority group of the Member States' *preferences*, and heterogeneous if they fall outside the scope of the majority of the Member States. This thesis has argued that, sometimes however, applying this system in a strict way could be misleading or not even possible. This research has used an analytical device to compare the heterogeneous *preferences* of the principals with those of the agent to determine the preference alignment between the principals and the agent. In the case where the *preferences* among the principals were heterogeneous – as in chapters 5 and

7 - a *small subset of Member States sharing homogenous preferences* was identified to represent the *preferences of the principals*. The small subset was identified through preliminary research revealing which Member States were the most relevant and active in a particular case. The "active" Member States were identified on the basis of their engagement in an initiative in the field of energy or their being particularly vocal about their *preferences* and effort in pushing these *preferences* further.

In chapter 5, the small subset was identified among the eight Member States that proposed a third option on unbundling.[64] These Member States essentially led the fight against the Commission proposal and were highly influential during the legislative process. They sent a letter to the President of the ITRE Committee, to the President of the Energy Council, and to the Energy Commissioner, affecting the legislative process in a substantial way. In chapter 7, the small subset was identified as the Netherlands, the UK and the EEC that had a strong preference for the ECT. All of them saw the ECT as a tool to protect and facilitate trade and investment in the energy field (7.3.1.). The chapter showed that those countries were actually the more active and involved in the development of the ECT (7.4.).

Chapter 7 showed that looking at a *small subset of Member States sharing homogenous preferences* is particularly convenient where several Member States with different *preferences* need to be taken into account in the research. Identifying a small subset, however, requires deep preliminary analysis across a wide range of sources in order to identify which States are actually active and relevant for the research. As far as chapters 5 and 7 are concerned, secondary data and interview data were the most important sources for understanding which Member States were the most relevant for the purpose of the analysis. Data gained from these sources was supplemented with data from official EU sources.

In summary therefore, the use of a *small subset of Member States sharing homogenous preferences* seems to be particularly useful when the *preferences* of the principals are heterogeneous. This analytical device allows an understanding of which principals are actually determining the dynamics of the principal-agent relationship in a particular

[64] Austria, Bulgaria, Germany, France, Greece, Luxembourg, Latvia and Slovakia (See 5.3.1.)

case. The small subset is particularly important in cases where a small number of Member States is actually able to dictate the dynamics of the relation between the Commission and the Member States on a particular initiative. In these cases, investigating the majority of Member States would be misleading. The small subset, however, required careful preliminary research across a wide range of sources, among which interview data and secondary data are the most relevant. This latter point leads to the next subsection that deals with the data used for this research.

8.3.6. Breadth and variety of the range of sources used

As mentioned several times in this chapter, this thesis relied on a broad range of sources aiming to capture and reflect the variety of preferences of the actors involved in this study. Although this latter point may seem obvious, this research showed how using as many different sources of data as possible is paramount when preferences need to be identified.

As far as the interview data is concerned, the aim during data collection was to interview not only interviewees involved in the PA relationship but also interviewees external to that relationship, in order to have a third and neutral point of view. Although this interview data was not incorporated into the thesis for specific arguments, it has broadly contributed to the understanding of the bigger picture and the analysis and interpretation of all the other data. For this reason, Appendix I at the end of this study distinguishes between cited and not-cited interviews.

Chapters 4 and 5 relied heavily on official documents concerning the legislative processes, such as Council conclusions and summaries drafted by the Legislative Observatory. These sources alone, however, would have told us little about the *preferences* of the actors and the intensity of the conflicts between the Commission and the Member States. Secondary data, especially journalistic reports, were more useful in this regard. Secondary data, however, was supplemented by a large amount of interview data that was particularly useful in this regard. The use of interviews, however, also revealed that energy is a very sensitive topic and interviewees were not always willing to share the deep motivations underpinning their policy choices.

Chapters 6 and 7, instead, relied more heavily on interview data and secondary data as far as the analysis of the actual behaviour of the Commission in the institutions of the EnCT and ECT was concerned. There is not much official data on this aspect and so interviews were quite important sources of information. In addition, the fact that secondary data did not report any conflict between the Commission and the Member States over these treaties also contributed to their categorisation as having an absence of deviation. Official documents were used more extensively for the phase concerning the decisions of the conclusions of the EnCT and ECT as the interview data on these negotiations, especially for the ECT, was rather limited (the analysis in Chapter 7 has therefore also relied on secondary data (Matlary 1997; Doré and De Bauw 1995)).

The empirical chapters showed that in order to get a clear picture of the preferences of the Member States and the Commission, several sources need to be taken into account. Indeed, while official documents can be very vague about the preferences of the actors, secondary data can provide clearer information. Secondary data, however - especially journalistic reports – can often be misleading and need to be supplemented by other sources such as interview data. By the same token, over-relying on interview data could also produce negative effects on the validity and reliability of the research. All the sources, therefore, were taken into account and compared across the entire analysis.

To sum up this sub-section, this thesis suggested that the use of a wide range of data is paramount if the preferences of the actors are to be explained. This thesis has shown that using and comparing a wide range of primary and secondary sources increases the validity and reliability of the research.

8.3.7. Generalizability

One of the aims of this research was to derive generalizable results about the effect of *preferences* and *interests* on the Commission's behaviour (see sections 1.4 and 3.2.). This thesis looked at a specific policy area, *the external dimension of the EU's internal energy market*. How can this analysis contribute to a broader understanding of the Commission's behaviour?

Despite some limitations (which will be illustrated in the next section), this thesis seems to contribute to the understanding of the Commission's behaviour as agent of

the Member States. If Milner's (1997) distinction is found useful, for the purpose of simplification, then the findings about the Commission's behaviour can be generalised to – or at least tested in – other policy areas. Taking the interests of the actors as given and focusing on their *preferences* – or specific policy choices – seems to be useful analytically for investigation of the Commission's behaviour as an agent vis-à-vis its Member States. Doing so allows the research to go beyond the dichotomy of deviation/non-deviation and consider more cooperative scenarios, responding to some criticism of the PAM (Bocquillon and Dobbels 2013).

The main findings that can be generalized from this thesis are that the Commission is a complex actor and that its behaviour cannot simply be defined in terms of deviation/non-deviation. Rather, it makes sense to make distinctions about its goal or preferences, some of which are more fixed and general (*interests*) and some of which are more specific and might vary (*preferences*). Consequently, another generalizable finding is that the Commission might share some of these preferences with the Member States and therefore be willing to satisfy these *preferences* without creating a conflict situation with the Member States. Finally, another important and possibly generalizable finding is that the explanatory factors chosen for this thesis – the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) seems to carry some explanatory power of the Commission's behaviour and can therefore be tested in other policy areas.

The findings of this thesis about the agent's behaviour and the factors likely to affect it, therefore present some features of generalizability. This thesis has also offered a model and some hypotheses which can be verified in other policy areas.

8.4. Limitations of the research and avenues for future research

So far this chapter has looked at the main findings of this research and their implications and contribution to the PAM. This sections turns to the limitations of this research and highlights some possible avenues for future research. The section highlights two main points. Firstly, the section stresses the lack of a clear measurement of the effect of the independent variables on the dependent variable and investigates

whether other possible explanatory factors might contribute to explain the agent's behaviour. Secondly, the section reflects upon some limitations in data collection[65].

8.4.1. Other factors likely to explain the agent's behaviour

At this point, the question arises as to whether there are factors other than the independent variables chosen for this thesis that can explain the absence of deviation in chapters 6 and 7. In light of the result of the empirical chapters, the following points can be made. Firstly, Member States seem to have made an **effective use of *ex-ante* control mechanism** when they established the procedure for the adoption of a common EU position at the institutions created by the EnCT and the ECT. Using control mechanisms, they made sure that the Council was involved every time a decision likely to affect their interests was to be taken. In the case of the ECT, it should also be noted that the Member States sit at the Energy Charter Conference together with the Commission. The use of control-mechanisms could also be seen as a consequence of the homogeneity of *preferences* among the Member States (IV1). The use of control mechanisms, therefore, can still be somewhat explained by the first independent variable. In chapter 7 however, the *preferences* of the Member States were identified as heterogeneous. In this case, however, the Member States have even more powerful *ad-locum* control mechanisms, as they participate in the Energy Charter Conference together with the Commission and can therefore control the agent. A possible explanation for this might be that while having heterogeneous *preferences*, the Member States designed the ECT to ensure that they all had a say and could control the Commission in the ECT Conference. The use of control mechanisms seems still to be explained by the PAM.

[65] One of the main criticism moved against the PA model is that, it might at times be too static and simplistic. The model is particularly effective in accounting for the relation between the Commission and its Member States but less so in considering other actors external to the principal-agent relation. This thesis, for instance, deliberately kept other actors such as the European Court of Justice and the European Parliament out of the model. This was because the European Parliament has been described as being an outlier in terms of PA analysis (Pollack 2003, 13–14). Indeed, the Parliament has been delegated a primarily legislative role but not the right of initiative (Ibid).
Although the Parliament has been mentioned several times across the four empirical chapters, data does not seem to suggest that a full treatment of the role of the European Parliament might be warranted. This is so because the results do not seem to suggest that the position of the European Parliament on the initiatives analysed in the empirical chapters strongly affected the Commission's deviation from the preferences of the Member States.

A second possible explanation for the absence of deviation in the EnCT and ECT is that both treaties are rather **technical**. They deal with the expansion of the EU energy acquis and regulatory framework to non-EU countries. These treaties do not create new obligations on the Member States and are not highly politically sensitive. Chapters 6 and 7 suggested that the Member States supported the EnCT and the ECT because these treaties did not imply any negative implication on their own energy choices (6.3.3). As one interviewee, working for DG Energy, stated: "as long as you do not touch the nuclear and the major companies there is always room for cooperation" (Interview No 4).

As with the first independent variable, the question arises as to whether other factors may explain the Commission's deviation in chapters 4 and 5. These chapters do not seem to provide evidence for such a claim. Chapter 5 showed however, that German companies, for instance, started to unbundle while German government representatives were still fighting the Commission's proposal (5.4.5.). Although the amount of primary data for this case was somewhat limited, interviewees suggested that, on unbundling, there was a battle against the Commission led by France, and that Germany was France's ally. The data, therefore, seems to suggest that *preferences* can, to a degree, still account for the Commission's deviation.

In summary therefore, the independent variables chosen for this research – the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) seem to provide sufficient explanatory power for the explanation of the deviation in the dependent variable – the Commission's deviation from the Member States' *preferences*. The section has also suggested that *preference* alignment between the principals and the agent (IV2) seems to provide more explanatory power than the *preference* alignment among the principals (IV1). While these two independent variables seem to account somewhat for the deviation of the Commission in chapters 4 and 5, other factors may also contribute to an explanation of the behaviour of the Commission in chapter 6 on the EnCT and chapter 7 on the ECT. This thesis suggests that the homogeneity of *preferences* between the Commission and the Member States might account for the absence of deviation by the Commission in the EnCT and in the ECT. The thesis,

however, also raises the question as to whether there could be other reasons – such as the technical aspect of these treaties, the *ex-ante* control mechanisms, the institutional framework set up by the treaties and so on – that may have affected the Commission's behaviour in these cases. Future research is needed to address this point in detail.

Along similar lines, this sub-section also emphasised that a clear measurement of the use of control mechanisms, and the effect of the *preferences* on the Commission's behaviour, is still lacking. This research suggested in chapters 6 and 7, for instance, that the Commission has probably not deviated from the preferences of the Member States because its *preferences* were homogeneous with those of the principals (IV2). To what extent the Commission's behaviour can be explained by the homogeneity of preferences (IV2) and to what extent can it be explained by the effectiveness of the *ex-ante* control mechanisms established by the principals? These questions also open the floor to further questions about the intentionality of the Commission, which is particularly hard to detect and operationalise.

8.4.2. Limitations in data collection

Given its importance for the economy, energy policy is, and will probably always remain, a highly sensitive topic. This characteristic of energy policy has particularly affected the data collection of this thesis. Firstly, energy is very much linked to other policy areas such as foreign policy which is possibly one of the most secret policy areas. In addition, energy is also linked to commercial interests, which are also guarded jealously by national governments. The data collection for this thesis revealed that the officials working in the Commission, the Council and the Permanent Representations were rather reluctant to share information about their energy policies and the reasons underpinning their policy choices in this area.

Another factor that affected data collection concerns chapters 6 and 7. The EnCT and the ECT are initiatives that cover several years. The ECT was signed in 1994 while the EnCT was signed in 2005. The treaties are both still in force today. This characteristic has been particularly challenging in terms of data collection and data analysis. Firstly, operationalising the preferences of the Member States over a long period of time has required the imposition of some simplifications and preliminary

assumptions for the sake of clarity of the analysis. Secondly, collecting data among the interviewees was also challenging because interviewees can only provide information for the limited amount of time during which they have been involved on a particular initiative. This is so also because institutions such as the Commission and Permanent Representations routinely ensure that staff are moved to new positions on a regular basis.

8.5. Conceptual and empirical contribution

In light of the reflection conducted so far, this section stresses the conceptual and empirical contribution of this thesis. Firstly, the section states the contribution to the PA literature in terms of understanding of the agent behaviour. Secondly, the section moves to consider what this study adds to the knowledge of energy policy more broadly.

The main theoretical contribution of this thesis consists in the distinction between interests and preferences which allows accounting for a more nuanced classification of the agent behaviour. Stemming from Rational Choice Theory, most of PA literature assumes that "actors have a fixed set of preferences or tastes" and that they "behave instrumentally as to maximize the attainment of these preferences" (Hall and Taylor 1996, 944–5). This thesis, instead, has argued that not all of these "tastes" are equally fixed or given. Using Milner's (1997) distinction between interests and preferences, this study has argued that while the former are fundamental goals which change little, the latter are specific policy choices. Taking this distinction seriously allows an additional level of analysis of the relationship between the agent and the principals. While most of PA literature simply assumes these actors have different interests or preferences – both terms are used almost interchangeably – Milner's distinction allows accounting for situations in which the actors might have similar preferences even if keeping divergent interests.

The analysis conducted in this thesis has suggested that the distinction between interests and preferences is useful in providing a more nuanced classification of the Commission behaviour. More precisely, the Commission behaviour might fall into one of the three following categories: absence or deviation or compliance, responsive

autonomy, deviation (see Chapter 3, section 3.3.). While most of PA literature simply accounts for deviation or not deviation, this thesis has suggested that the principals and the agent might share some preferences even if keeping different interests. When this is the case, the agent will be responsive to Member States' demands. This thesis has categorized this kind of scenario as "responsive autonomy". Chapter 6 and 7 have then provided some empirical evidence to support this theoretical claim.

This study has also offered some empirical contribution in terms of understanding of energy policy. Firstly, this study has suggested that energy policy is peculiar in terms of delegation with little executive power been delegated to the Commission. On this regard, energy policy differs from other policy areas such as trade and fisheries where delegation of power has been more substantial.

Secondly, the study has addressed a gap in the existing literature on energy policy (See Chapter 1, section 1.3.). While existing scholarship reflects upon several themes in this policy area – such as the difficulties in building a common energy policy, the external dimension, the role of the Member States and the role of the Commission – a set of testable hypotheses about the relationship between the Member States and the Commission is still needed. Trying to address this gap, this thesis has offered some hypotheses about the conditions under which the Commission might try to deviate from the preferences of the Member States. Doing so, the thesis has contributed to a better understanding of energy policy.

Testing four different hypotheses, some important features of energy policy have emerged. First of all, Member States and the Commission have divergent interests when it comes to energy policy: the former aims to keep control over energy policy while the latter aims to expand its competence. The study has also suggested, however, that these actors might also agree on some specific policy choices such as a common market in energy with Southern-Eastern European countries (Chapter 6) or a legal framework for trade of and investment in energy (Chapter 7).

The analysis conducted across the four empirical chapters has also revealed a difference between the two ways in which the external dimension of the internal energy market manifests itself. On the one hand, the relationship between the

Commission and the Member States seems to be more conflictual as far as internal legislation is concerned (see Chapter 4 and 5). On the other hand, some more cooperative scenario seems to emerge when it comes to initiatives aiming at the creation of an integrated energy market with third countries (i.e. Energy Community Treaty, Energy Charter Treaty, see Chapter 6 and 7).

To summarize this section, this thesis has provided both a conceptual and empirical contribution. From a conceptual point of view, the distinction between interests and preferences has proven useful to achieve a better understanding of the agent behaviour going beyond the dichotomy of deviation/not deviation of current PA literature. From an empirical point of view, this study has revealed some important features of energy policy such as the peculiarity of delegation of power in this policy area and the variety of interests and preferences of the actors involved. This variety might lead to more conflictual (internal EU legislation) or cooperative (creation of an integrated energy market with third countries) scenarios between the Commission and the Member States.

8.6. Conclusion

What does this research add to the knowledge about the Commission as an agent of the Member States in the post-delegation phase? This chapter has recalled the main results of this thesis highlighting the implications for, and contributions to, the PAM, together with some limitations that future research might address. It has suggested that, despite some limitations, the PAM seems to be useful in explaining the conditions under which the Commission is likely to deviate from the *preferences* of the Member States' (DV) in the *external dimension of the EU internal energy market*. The independent variables chosen for this thesis – the *preference* alignment among the principals (IV1) and the *preference* alignment between the principals and the agent (IV2) – seem to be rather persuasive in accounting for the deviation of the dependent variable in this thesis.

The chapter has shown that this research might contribute to the PA literature in several ways. Firstly, this thesis tested the model in a policy area in which PA has not been used extensively to date. The results of this thesis might be generalised to, or at least

tested in, other policy areas as well, contributing to an explanation of the principal-agent relationship more generally. Secondly, the thesis focused on post-delegation behaviour – on which the literature is not abundant. Thirdly, the analysis has applied Milner's (1997) distinction between *interests* and *preferences* systematically on four cases, seeking to look beyond the dichotomy of deviation/non-deviation that characterises most PA studies. Fourthly, the thesis has used an analytical device to compare the heterogeneous *preferences* of the principals to those of the agent. Finally, the thesis has shown the importance of relying on a wide range of sources in order to infer the preferences of the actors involved in this study.

This chapter has also highlighted some limitations of this thesis together with avenues for future research. Despite the PAM being very useful in looking at the relations between an agent and its principals, it does not take into account other actors such as, in this thesis, the European Parliament. Secondly, this thesis has focused on two independent variables for investigating the role of *preferences* while other factors might also contribute to explaining the behaviour of the Commission. Finally, the case studies selected for this research have presented several challenges in terms of data collection and data analysis.

The analysis conducted in this research has also suggested some unexpected findings on which future research might investigate. Firstly, conflict situations seems to be a good indicator that deviation has occurred and the agent has crossed a red line, triggering an opposing position from the principals. Secondly, focusing on preferences, the thesis has suggested that control mechanisms are particularly important in affecting the Commission's behaviour and that, while in internal legislation the agent has the opportunity to issue very ambitious proposals, the same is not in the external arena, where *ex-ante* and *ad locum* control mechanisms seem to constrain the agent to a greater extent.

In light of the research carried out in this thesis, it seems safe to argue that this work contributes to the knowledge of the Commission as agent of the Member States. This thesis has gone beyond the most common assumptions about the divergent interests that exist between the Commission and the Member States in energy policy. It tried to

conceptualise this conflict in a principal-agent relationship, while also developing hypotheses about the conditions under which the Commission would try to satisfy its *preferences* rather than those of the principals. Certainly, future research might improve the explanation of the principal-agent relationship in this policy area and beyond.

Appendix I List of Interviews

Cited:

- Interview with an official from the European Commission – DG ENERGY, 6/06/2013, (Interview No 1)
- Interview with an official from the European Commission – DG ENERGY, 6/06/2013, (Interview No 2)
- Interview with an official from the European Commission – DG ENERGY, 7/06/2013, (Interview No 3)
- Interview with an official from the European Commission – DG ENERGY, 12/06/2013, (Interview No 4)
- Interview with a Member State Official, 17/06/2013, (Interview No 7)
- Interview with a Member State Official, 19/06/2013, (Interview No 10)
- Interview with a Member State Official, 21/06/2013, (Interview No 11)
- Interview with a Member State Official, 24/06/2013, (Interview No 12)
- Interview with an official from the European Commission – DG ENLARGEMENT, 24/06/2013, (Interview No 13)
- Interview with an official of the Council of the European Union, 1/07/2013, (Interview No 17)
- Interview with a Member State Official, 1/07/2013, (Interview No 18)
- Interview with an official from the European Commission – DG ENERGY, 1/07/2013, (Interview No 19)
- Interview with an official from the European Commission – DG ENERGY, 1/07/2013, (Interview No 20)
- Interview with a Member State Official, 2/07/2013, (Interview No 21)
- Interview with a Member State Official, 2/07/2013, (Interview No 22)
- Interview with an official from the European Commission – DG ENERGY, 12/07/2013, (Interview No 25)
- Interview with a Member State Official, 17/07/2013, (Interview No 27)
- Interview with a Member State Official, 18/07/2013, (Interview No 28)

Not cited:

- Interview with a consultant of a Sector Association, 14/06/2013, (Interview No 5)

- Interview with a consultant of a Sector Association, 17/06/2014, (Interview No 6)
- Interview with an official of the European External Action Service, 18/06/2014, (Interview No 8)
- Interview with a researcher of a think tank, 19/06/2013, (Interview No 9)
- Interview with an official of the European External Action Service, 26/06/2013, (Interview No 14)
- Interview with a researcher of a think tank, 26/06/2013, (Interview No 15)
- Interview with an official of the European External Action Service, 27/06/2013, (Interview No 16)
- Interview with an official of the European External Action Service, 3/07/2013, (Interview No 23)
- Interview to an official of the US Mission to the EU, 3/07/2013, (Interview No 24)
- Interview with an official of the European External Action Service, 15/07/2013, (Interview No 26)
- Interview with an official of the European External Action Service, 22/07/2013, (Interview No 29)

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